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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MICHAEL G. NEW,

Petitioner,

v.

WILLIAM H. COHEN, SECRETARY OF DEFENSE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED.

Is a U.S. soldier who refused, on constitutional and statutory grounds, to obey a presidential order requiring him to become a "UN soldier" (mandating UN uniform items, placing him under foreign commanders with exclusive UN allegiance, and requiring exclusive use of a UN identity card in the mission area) required to complete his military criminal appeals before seeking habeas relief in federal court which requests an honorable discharge in order to avoid UN military service?

PARTIES

Petitioner Michael G. New is a serviceman seeking habeas relief in the form of an honorable discharge from the U.S. Army. The respondents are William S. Cohen, Secretary of Defense, and Togo D. West, Jr., Secretary of the Army.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

MICHAEL G. NEW,
Petitioner,

v.

WILLIAM S. COHEN,
SECRETARY OF DEFENSE, et al.,

Respondents.

Petition for a Writ of Certiorari
To The United States Court of Appeals
For The District of Columbia

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia entered in this matter on November 25, 1997.

OPINIONS BELOW

The opinion of the district court in this matter is reported at *U.S. Ex rel. New v. Perry*, 919 F. Supp. 491, 493 (D.D.C. 1996). The decision of the court of appeals appears at *New v. Cohen*, 129 F.3d 639 (D.C.Cir. 1997).

BASIS FOR SUPREME COURT JURISDICTION

This petition seeks review of a final decision of the United States Court of Appeals for the District of Columbia denying petitioners application for a writ of habeas corpus which was entered on November 25, 1997. No petition for rehearing was filed. Jurisdiction to hear this matter is conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, AND REGULATIONS

The full text of the constitutional provisions, treaties, statutes, and regulations, involved in this case are set out in the appendix as provided by SUP. CT. R. 14(f) since they are voluminous. The citations are: Constitutional Sections: Article I § 8 Cl. 14, Article I § 9, Article II § 2, Article III § 1. Statutes: 5 U.S.C. § 7342, 22 U.S.C. § 287-d1, 22 U.S.C. § 287-d, Article 92 of the Uniformed Code of Military Justice. Regulations: Army Reg. 670-1 ¶ 3-4k.

STATEMENT OF FACTS

On January 14, 1993, Petitioner Michael New signed an eight-year Enlistment Agreement in the U.S. Army in which he "subscribed to and duly swore" to the following oath:

> I, MICHAEL GARRETT NEW, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations

and the Uniform Code of Military Justice. So help me God.

After basic training, New was assigned to Fort Sam Houston for training as a Medical Specialist which he successfully completed. New was then assigned as a Medical Specialist to Fort Bliss, Texas. During October-November, 1993, New was deployed to Kuwait as part of the United States forces in the aftermath of Desert Storm, Operation Southern Watch, where he served with honor.

On July 2, 1995, New was deployed to Schweinfurt, Germany. On August 21, 1995, New was informed that his unit was to be deployed to Macedonia in October 1995 as part of a United Nations peacekeeping force. New was advised that he, and all other members of his unit, would be required to wear a "new uniform," namely the "United Nations uniform" consisting of an insignia patch on his Battle Dress Uniform (BDU), the blue beret or helmet of the UN, and certain other accouterments in the powder blue colors all supplied by the UN. On this same date, New informed his squad leader and platoon leader that he would not wear the UN uniform until provided with the legal and constitutional authority requiring him to do so. On August 23, 1995, New was ordered to rethink his position, by reviewing the UN Charter, its history and objectives. New reviewed the Charter and on September 19, 1995, he submitted a written statement claiming that the order deploying him to the UN violated his status as an American soldier, his enlistment contract, and his oath of office:

> I am an American who was recruited for and voluntarily joined the U.S. Army to serve as an American soldier. I am not a citizen of the United Nations. I am not a United Nations Fighting Person.

> I have never taken an oath to the United Nations, but I have taken the required oath to support and defend the Constitution of the United States of America.

New reasserted that he was willing to perform all duties required by his enlistment contract:

> I am not trying to avoid a difficult or dangerous assignment or to get out of the Army. I served in Kuwait last year and have offered to serve anywhere in the world, in my American uniform, in the capacity as a U.S. Army medic under American command and U.S. Constitutional protections.

Additionally, New repeated his request for a transfer or an honorable discharge:

> In order to avoid controversy or to avoid placing the Army in a bad light, I have requested a transfer to a unit that is not required to wear the UN uniform. I was told that such was not possible and I was even reluctantly willing to accept an honorable discharge, and I was willing to sadly and reluctantly withdraw from the U.S. Army quietly.

New reaffirmed his resolve to adhere to his oath of office:

> I took an oath to defend the Constitution of the United States of America against all enemies foreign and domestic. As an American soldier, I was taught and believe that the Constitution of the United States of America is the fundamental law of America and if there is any conflict . . . with the UN or any treaty . . . that the U.S. Constitution would always prevail.

Finally, he protested that the order to serve the UN would forfeit his status as an American:

> I am losing something precious and more valuable than the U.N. can possibly grant me by surrendering my status as an American soldier and fighting man . . . . I do not intend to surrender my status as an American soldier to wear the uniform of a foreign power.

On October 2, 1995, New and 550 members of his battalion attended, as ordered, an "Information Briefing" conducted by JAG officer Captain Michael Klein on the deployment of American troops to Macedonia as "U.N. troops." Captain Klein set forth numerous "policy" and some "legal" bases for such deployment. However, the only "legal base" offered for the wearing of the uniform was the written statement projected on an overhead:

> Why do we wear U.N. uniform items?
> A: Because they look fabulous!

Immediately following this briefing, Colonel Stephen Layfield ordered New ". . .to wear the UN accoutrements on" his uniform on October 10, 1995. Two days later, Captain Roger H. Palmateer "reissue[d]" the "direct order to wear the United Nation's patches, for all soldiers going to Macedonia."

New was also informed that he would be fighting under the command of foreign officers; ultimately a General from Finland would have command of his unit. These officers are required to take an oath of allegiance to the United Nations which precludes them from accepting

direction from any other source including their own nation.[1]

Military identification was another evidence of the new command. While in transit to and from the mission area, troops were to possess their nation's identification. But upon arrival, troops were to "be issued a U.N. peace-keeping force identification card which will be the only identity document required within the area of operation."

Earlier, by a letter dated 19 September 1995, from Colonel Michael C. Chapman of the General Staff of the Office of the Chief of Legislative Liaison, Department of the Army to his parents, New also learned that as "UN soldier" he would not retain the protections of the Geneva Convention to which he was entitled as a U.S. soldier. Colonel Chapman informed New's parents that the Geneva Convention would not afford any protection to a U.S. soldier because that Convention applies only to Prisoners of War and, that "if captured, or detained" while in service of a United Nations "peacekeeping mission," U.S. soldiers would not "be considered Prisoners of War." Instead New would be protected, it was claimed, by the Convention on Privileges and Immunities of the United Nations.

With UN uniform, a UN identification card, UN

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[1] I solemnly affirm to exercise in all loyalty, discretion and conscience the functions entrusted to me as a member of the international service of the United Nations, to discharge those functions and regulate my conduct *with the interest of the United Nations only in view, and not to seek or accept instructions in respect to the performance of my duties from any government or other authority external to the organization*. (Emphasis added).

TRYGVIE LIE, IN THE CAUSE OF PEACE (New York, The Macmillan Company, 1954) p. 33.

command, and the "protection" of a UN Convention (rather than the Geneva Convention) it was apparent to New that he was being asked to surrender his sworn exclusive allegiance. Indeed in the district court, the Secretaries of Defense and Army described New's status as "both a U.S. soldier and a UN soldier."[2]

On October 10, New appeared in formation, but without "the prescribed uniform." On October 17, New was charged with violation of Article 92 of the Uniform Code of Military Justice:

> In that Specialist Michael G. New, U.S. Army, having knowledge of a lawful order issued by LTC Stephen R. Layfield on 2 OCT 95 and CPT Roger H. Palmateer on 4 OCT 95, to wear the prescribed uniform for the deployment to Macedonia, i.e., U.N. patches and cap, an order which it was his duty to obey, did, at or near Schweinfurt, Germany, on or about 10 OCT 95, fail to obey the same.

On January 24, 1996, New was convicted by a court-martial jury and sentenced to a Bad Conduct Discharge. On June 12, 1996, Major General Montgomery Meigs confirmed New's sentence, suspending, however, the implementation of the discharge until New's military appeals were completed.

New was placed on involuntary excess leave and allowed to leave Germany. Still a member of the U.S. Army, New currently resides in Texas.

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[2]Gov't Brief, in the district court, at 47.

PROCEDURAL HISTORY AND BASIS FOR FEDERAL JURISDICTION

New, a member of the United States Army, filed his petitioner for habeas corpus against the Secretaries of Defense and Army on January 12, 1996 in the United States District Court for the District of Columbia. His habeas petition was filed pursuant to 22 U.S.C. § 2241. New requested that the writ be granted to honorably discharge him from the U.S. Army to enable him to avoid service as a UN soldier.

On January 13, 1996, District Court Judge Paul Friedman heard extensive oral arguments in response to an emergency motion for a stay. A written order denying the stay was issued on January 16, 1996. This order also ordered further briefing and a full hearing on the habeas corpus petition which was heard on March 18, 1996.

On March 26, 1996, the district court issued a lengthy written opinion denying the petition solely on the grounds of comity with leave to reopen the matter when the military courts had completed their processes.

New's arguments that comity was not appropriate in this circumstance relied primarily on this Court's holding in *Parisi v. Davidson*, 405 U.S. 34 (1972). The district court distinguished *Parisi* on the basis that it involved a formal administrative process for those seeking conscientious objector status while already in the military. Although the district court noted that New followed and completed every administrative avenue the Army made available to him, these were informal in nature. Thus, the court concluded that New had not "exhausted" the administrative remedies within the meaning of *Parisi*. 919 F.Supp at 497.

The district court also held that New's argument that he was being forced to undergo a change in status "might have more weight" if he had gone ahead and worn the UN uniform and gone to Macedonia, which would necessarily result in the issuance of a the new UN identity card and actual placement under foreign command. 919 F.Supp at 498.

New filed a timely appeal to the United States Court of Appeals for the District of Columbia on May 23, 1996.

The government filed a motion for summary affirmance in the court of appeals on July 15, 1996 which was denied by an order dated March 5, 1997.

On November 25, 1996 the court of appeals denied New's habeas petition, again solely on the grounds of comity. Like the district court, the court of appeals reasoned that *Parisi* was not applicable because New had exhausted only an informal administrative process which was not akin to the statutorily-authorized, exhaustive process available to those claiming a conscientious objection to military service while already in the military. 129 F.3d at 647.

Despite the fact that *Parisi* involved a military person seeking release from the service under a habeas petition, the court of appeals relied on *Schlesinger v. Councilman*, 420 U.S. 738 (1975) to also hold that only civilians may seek a preemptory habeas writ while awaiting military prosecution. 129 F.3d at 643.

This petition for a writ of certiorari is filed within ninety days of the decision of the court of appeals as specified by SUP. CT. R. 13.1.

SUMMARY OF ARGUMENT

This Court has allowed preemptory federal habeas review when military criminal matters were pending in a certain narrow class of cases—when the claim for release is a serious one, based on the status of the petitioner, not his acts, and which present questions outside the special expertise of the military tribunals. Both military personnel and those with significant military connections have been permitted to turn to the federal courts to seek immediate release from the military and its courts.

In short, this Court has agreed immediate habeas review to serious questions about status. And this case raises one of the most significant status questions in the history of the Republic.

Michael New has been ordered by the President of the United States to become a "UN soldier." New has not been ordered to fight *with* the UN while maintaining his status as a U.S. soldier. He did that in the Gulf War without objection. He has not been merely ordered to fight alongside other nations, as American soldiers have gallantly done so many times. He has been ordered to *become* a UN soldier, with a UN uniform, with an exclusive UN identity card, and with foreign commanders with sworn exclusive allegiance to the United Nations. He even forfeits his rights under the Geneva Convention that he is entitled to as a U.S. soldier.

Can the president really order Americans to become soldiers *for* other sovereigns? Does the president have the unilateral authority to command Americans to become little more than mercenaries? And should such issues first be resolved in the military courts which are under the command

influence of the president and which, it naturally follows, have no history of ever deciding that an order issued by the president is unconstitutional?

New raises meritorious constitutional and statutory arguments that Congress must consent before any American soldier may join a foreign military service or place foreign insignia on the U.S. Army uniform. He further contends that the United Nations Participation Act clearly outlaws the deployment of American troops under UN command unless Congress has approved.

New does not seek the creation of any expanded grounds for federal court intervention in day-to-day military affairs. An affirmative ruling in this case will not give any new grounds for federal court jurisdiction for members of the military with gripes or grievances real or imagined. Almost no other situation would raise serious questions of status. But an order to become a member of a foreign military body indeed does. New's claim for immediate federal court review is a straight forward application of the existing precedent of this Court, requiring no doctrinal expansion .

In this day of increased international cooperation, it is incumbent upon Article III courts, not the military courts, to initially determine whether such cooperation may constitutionally extend to the point that American citizens are impressed into foreign military service.

No floodgates will open, unless the president decides to order massive numbers of Americans to begin military service in foreign uniforms, under foreign commanders, with foreign identification cards, and, at best, dual allegiance to this country and the foreign one. It is unthinkable for the

federal courts were to be dammed shut to American citizens who bring a claim that such an order by the president is unconstitutional.

ARGUMENT

I

THIS CASE RAISES SUBSTANTIAL QUESTIONS THAT FALL OUTSIDE THE JURISDICTION OF THE MILITARY COURTS. THEREFORE ABSTENTION BASED ON COMITY IS UNWARRANTED.

Michael New's claims fit squarely within the four-corners of this Court's holdings that military personnel may come immediately to the federal courts with serious habeas claims which show that the petitioner's status is inconsistent with the asserted military jurisdiction, notwithstanding a pending military court-martial against him. *Parisi v. Davidson*, 405 U.S. 34 (1972), *Reid v. Covert*, 354 U.S. 1 (1957), *Toth v. Quarles*, 350 U.S. 11 (1955) and *Billings v. Truesdale*, 321 U.S. 542 (1944).

In *Parisi*, this Court accepted jurisdiction of a habeas petition seeking discharge from the armed forces from a serviceman claiming a conscientious objector status even though court-martial proceedings were pending against him. In *Billings*, this Court accepted jurisdiction of a habeas petition seeking discharge from a draftee claiming c.o. status even though court-martial proceedings were pending. In *Toth* and *Reid* this Court took jurisdiction of a habeas petition filed by a former serviceman and the wife of a serviceman claiming civilian status even though court-martial proceedings were pending.

All four of these cases contained one common

element, status. The habeas petitioner either claimed that his status had changed so that the military no longer had jurisdiction over him or that his status was such that the military had never obtained such jurisdiction.

Like the four petitioners in these cases, Michael New has claimed that the military has no jurisdiction over him because the military changed his status. Yet, the court of appeals disregarded this similarity ruling that this Court held in *Schlesinger v. Councilman*, 420 U.S. 738 (1975) that there is only one status exception to the normal comity rule—that of civilian.

This is clearly wrong, as the *Parisi* ruling demonstrates. A serviceman may obtain habeas relief if his status is such that the military can no longer assert any jurisdiction over him whatsoever. The court of appeals, however, dismissed *Parisi* as available only to those servicemen who based their status claim upon grounds which the military has formally recognized and for which the military has provided an elaborate internal administrative process for resolution of such claims.

This court of appeals' reading of *Councilman* and *Parisi* are clearly wrong. The rule of this Court is a simple one. Where a habeas petitioner has grounded his petition upon a substantial claim of status—disputing the right of the military to try him at all—then the normal rule of comity does not apply.

This simple lesson can best be illustrated in an exchange between former Justice Thurgood Marshall and then-Solicitor Robert Bork in the oral argument in *Councilman*:

QUESTION: Isn't there a difference here in the claim you can't try him at all?

MR. BORK: That is correct. That is why I wish to say that it is semantically possible, Mr. Justice Marshall, to make this case sound as if it were similar to *Toth v. Quarles* or *Reid v. Covert* or that line of cases, because it can be put in terms that the question is the military's power to try the man.

I think it's quite different from those cases because in those cases the military's lack of power to try the man comes from his status and not from his conduct.[3]

This exchange illuminates the first of four inquiries that this Court has repeatedly employed in determining whether a person may immediately turn to the federal courts for habeas relief rather than awaiting the completion of military appeals. These inquiries are:

1. Is the claim for immediate access to federal courts based on the nature of the person's status or the nature of the person's conduct?

2. Is the status claim substantial?

3. Is it possible to obtain the requested relief in the military courts?

4. Do the nature of the legal claims come within the expertise in the military courts?

The answer to each of these four questions strongly supports Michael New's claim for immediate Article III

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[3]Tr. of Oral Arg. at 6.

review of his habeas petition.

A.

NEW'S HABEAS CLAIM IS BASED ON HIS STATUS, NOT HIS CONDUCT

In four significant cases, this Court has reached the merits of a petitioner's jurisdictional and constitutional claims while proceedings in military courts were pending. In *Toth*, this Court held that a discharged serviceman is not subject to military prosecution for crimes committed during his term of service. Significantly, this Court reached its jurisdictional holding prior to the completion of the military proceedings. 350 U.S. at 13, n.3. In *Reid*, this Court reached the merits and sustained a jurisdictional challenge filed by a wife of a soldier holding that American civilians could not be tried in military courts for offenses committed in other countries. Again, it is significant that this ruling was made while Mrs. Covert was awaiting trial for murder in the military court. 354 U.S. at 4. In *Billings*, this Court took immediate jurisdiction over a habeas claim that Billings had not been lawfully inducted into the Armed Services because he was a conscientious objector. Even though military criminal charges were pending,[4] this Court made a favorable decision on the merits of his habeas claim.

The controlling fact in each case was the status of the petitioner. But this Court's holding in *Parisi* demonstrates that current members of the military may also raise status claims just as civilians with significant military connections were allowed to do in *Toth* and *Reid*.

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[4]321 U.S. at 543.

Joseph Parisi was a current member of the Army at the time he claimed to have crystallized his religious convictions objector and become a conscientious objector. He was unquestionably a member of the military at the time he disobeyed the order to board a plane to Vietnam. It was this refusal to obey which led to his subsequent court-martial. His claim to immediate federal relief was successful because it was premised on his status as a religious believer, not on the nature of his acts in refusing to board a plane to Vietnam.

The claim of the court of appeals that only civilians may seek habeas relief to contest the military's jurisdiction flies in the face of both *Parisi* and *Billings*. Such a rule was never suggested by this Court in *Councilman*. Parisi, like New, was clearly a soldier claiming a right to be honorably discharged. And in *Billings*, the petitioner had been ordered to report for induction and was, at least, in the twilight zone between civilian and soldier. But in both of these cases, this Court held that the federal courts were the proper forum to determine whether the petitioners were entitled to be released from military service.

In many respects New's claim is most like that in *Billings*. In that case, this Court granted immediate review for the claim of an American citizen that he was improperly compelled to serve our own army in time of war. New asks this Court to immediately review his claim that as an American citizen-solider he has been improperly compelled to serve the UN Army in time of peace. In both cases, court-martials were pending for refusing to obey the order to commence the contested military service. If *Billings* did not demand comity, neither does New.

Michael New's claim is totally unlike *Schlesinger v. Councilman* since he is not asking for federal court review

based upon the nature of his actions. Nor is he merely asking to be relieved of criminal prosecution. He is asking to be released from the military entirely to avoid UN military service.

New's federal habeas claims are predicated on his status as an American citizen. He claims that U.S. citizens cannot be unilaterally ordered to fight *for* another sovereign in light of the applicable constitutional and statutory provisions which, at a minimum, require the approval of Congress. Although his status claims are factually unique, so too is the claim of authority made by the government to be able to order him to serve a foreign power, and to become, in the words of the Secretaries of Defense and Army, "both a U.S. soldier and a UN soldier."

The court of appeals clearly erred by holding that servicemen must always complete their military appeals before turning to the federal courts. The correct line of demarcation is the one made in General Bork's oral argument in *Councilman*. Is the claim for federal court jurisdiction status-based or conduct-based? This theory accounts for all of this Court's holdings. Michael New's claim is status based.

B.

NEW'S STATUS CLAIMS ARE SUBSTANTIAL

In *Noyd v. Bond*, 395 U.S. 683, 696 n.8 (1969), this Court explained its holdings in *Toth* and *Reid* saying: "[I]t appeared especially unfair to require exhaustion of military remedies when the complainants raised *substantial* arguments denying the right of the military to try them at all." (Emphasis added).

Requiring military claimants to demonstrate status claims that has a substantial legal and factual basis keeps the door closed to claims for release that are marginal, insubstantial, or bizarre. More importantly it precludes federal court access for those who simply chaffed at the normal disciplines of military life.

Central to New's claim of harm is his contention that the order to don the United Nations uniform commands him to violate federal law. In support of this contention, New has relied upon the principle expressly endorsed by Article I, § 9 of the United States Constitution, namely, that no "present, Emolument, Office or Title from any. . . foreign state" may be accepted by any "Person holding any Office" under the United States "without the Consent of Congress." Not only has Congress not consented to an American soldier's wearing of U.N. insignias on his Battle Dress Uniform, but such an act is explicitly forbidden by 5 U.S.C. §§ 7342(b)(2) and 7342(a)(1)(D). There is no doubt that these statutory prohibitions apply to military personnel and to the United Nations. See 5 U.S.C. §§ 7342(a)(1)(D) and 7342(a)(2). And there is not doubt that New's claim is a substantial one in light of Army Regulation 670-1 ¶ 3-4k which prohibits the wearing of "(f)oreign badges, distinctive unit insignia, and regiment distinctive insignia" on Battle Dress Uniforms.

The Government has not attempted to escape these prohibitions with the claim that New's arguments are frivolous, or otherwise without substance. Rather, the Government has counterclaimed that the U.N. beret and shoulder patch are "gifts of minimal value" and, hence, within an exception defined by 5 U.S.C. § 7342(a)(3) and (c)(1)(A). New has rebutted this claim, by pointing out that 5 U.S.C. § 7342(a)(4) defines "insignia" as a "decoration"

and not as a "gift," thus clearly placing the U.N. beret and shoulder patch with in the scope of the statutorily prohibited items.

But there is more. The wearing of the United Nations uniform would signal that New, an American soldier, has become subject to United Nations command. Upon the donning of the uniform, he would become a United Nations soldier. Such an order, if enforced, would require New—an American soldier who has sworn an oath to uphold the Constitution of the United States and to obey the president as his Commander-in-Chief—to serve under a United Nations Commander who has worn an oath to uphold the United Nations charter and to obey the Secretary-General as his commander-in-chief.

For the government to persist in such a course of action undermines the very foundation upon which an American serviceman's enlistment contract is based. The contract oat is predicated upon the President's acting as Commander-in-Chief in accordance with the Constitution and relevant statutes. Accordingly, as New has demonstrated in the courts below the president may not transfer an American soldier's allegiance from serving the United States to serving the United Nations without compliance with Sections 6 and 7 of the United Nations Participation Act. (22 U.S.C. § 287-d and 287-d1). Both sections explicitly provide the rules governing a president's actions placing American armed forces under United Nations command.

In response to New's statutory claims, the Government did not urge that they be dismissed as wholly without merit. Instead, it maintained that Section 6 (which requires express approval of Congress) did not apply to the particular U.N. deployment at issue and that while Section

7 did not apply, the president had, in fact, complied with Section 7. However, the UN itself has proclaimed to have deployed this military mission pursuant to the section of the UN charter that corresponds to Section 6 of the UNPA. Clearly, New's arguments under the United Nations Participation Act are substantial.

To force an American soldier to divide his allegiance between two sovereigns, as an order to serve as a United Nations soldier does, violates New's oath of office as an American soldier. To force a soldier to serve two masters necessarily vitiates his enlistment contract for the very foundation of that contact is based upon the enlistee's singular allegiance to the United Sates of America. Indeed, to force upon him a "dual allegiance," especially where—as here—the enlistee is a citizen of the United States, demands as American soldier to submit to behavior that, in other contexts, would result in the loss of the soldier's citizenship. *Savorgnan v. United States* 338 U.S. 491, 499, 500 n. 17 (1950).

Whatever the ultimate merits of New's arguments, they are substantial ones that the military has no jurisdiction over a soldier when military authorities have persisted in a course of action requiring a soldier to violate his oath of office to defend and protect the Constitution of the United States and to obey the laws of Congress. New's claims are not ordinary ones alleging a mere contractual breach of his enlistment agreement. Instead, they go to the very legal foundation upon which New's transformation from citizen to military status rests—his oath. For, as Justice Brandeis ruled for a unanimous court nearly eighty years ago, "[i]t is the actual enlistment, the oath of allegiance, that changes the status from civilian to soldier." *United States v. Union Pacific R. Co.*, 249 U.S. 354, 359 (1919). By claiming that

his oath of office has been vitiated by the Government's insistence that he take on a new identity as a United Nations soldier, New's claims "inhere in the substance of the contract" and, if sustained, "render" New's military status under that contract "absolutely void." See *United States v. Grimley,* 137 U.S. 147, 153 (1890). Without question, then, New's arguments that he is no longer subject to military jurisdiction are "substantial." That is enough to trigger this Court's normal rule that "a writ of habeas corpus will issue to determine the status" of a person who "denies that he is in the military service." See *Ng Fung Ho v. White,* 259 U.S. 276, 284 (1922). Therefore, New is exempted from having to exhaust his military remedies as the normal rule of comity demands. *Noyd v. Bond, supra,* 395 U.S. at 696, n. 8.

C.

AN HONORABLE DISCHARGE IS SIMPLY UNAVAILABLE IN THE MILITARY COURTS

In *Parisi*, this Court held that abstention on the grounds of comity is inappropriate when the habeas petitioner seeks relief that is simply unavailable in the military courts. 405 U.S. at 42-44.

Michael New has requested an honorable discharge from the Army, claiming that the order requiring him to become a "UN soldier" so fundamentally changes the nature of his enlistment as a citizen-soldier as to require his release from such service. His court-martial appeal will only determine whether or not he is guilty of the crime of disobeying a lawful order and will in no way resolve his request to be honorably discharged from the Army.

In his court-martial appeal , he has, *inter alia*,

interposed technical defenses unrelated to the substantive claims in this case.[5] In *Parisi*, this Court noted:

> If the military courts should ultimately acquit the petitioner on grounds other than wrongful denial of his conscientious objector application, the respondents acknowledge that he could not seek habeas corpus relief in the military judicial system. In this event, therefore, the petitioner could clearly not obtain the relief that he seeks in the military court system.

405 U.S., at 43, fn. 12.

In *Councilman,* which the court below found to be controlling, this Court held that not only was it possible for the defendant to obtain a ruling that his actions were not service-related, and therefore, not actionable in the military courts, but that the military courts could grant Councilman the full relief that he was seeking. 420 U.S. at 760.

Parisi, not *Councilman*, is the applicable authority since the relief that New seeks in his habeas petition is "not even potentially available, much less that it would be prompt or certain." *Id.* at 42.

The court of appeals' predicate for distinguishing

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[5]New's military counsel have raised numerous such defenses, for example: (1) a challenge to a court-martial member (i.e. juror) who had issued an order to a subordinate to wear the UN uniform; (2) the legal and factual sufficiency of the evidence; (3) that he was prevented from obeying the order by being pulled out of formation prematurely; (4) failure to grant jury instructions on the defense of inability; and (5) the failure of the trial judge to allow evidence concerning the unlawfulness of the order. See, Brief for Appellant, *United States v. New*, ARMY 9600263, the United States Army Court of Criminal Appeals.

Parisi and *denying* federal court jurisdiction, amounts to a perverse reversal of this Court's doctrine of *favoring* federal court jurisdiction when the requested relief is not available in the military. The court held that the exception to comity announced in *Parisi* is only available when there are formal, statutorily authorized administrative appeals which have been exhausted.[6] This holding flatly contradicts two different things this Court said in *Parisi*.

First, this Court simply required that "all available administrative remedies" should be exhausted. Never has this Court suggested that the principle of comity requires a certain degree of complex administrative procedures. What purpose would such a rule serve? Comity is a rule designed to ensure that the competing jurisdiction has had an opportunity to complete its internal processes. See, e.g., *Weinberger v. Salfi*, 422 U.S. 749, 765, (1975) The proper question is: "Was the administrative process finished?" not "Was the administrative process sufficiently formal?"

Second, in *Parisi* this Court said, "the petitioner cannot properly be required to exhaust a remedy which may not exist." 405 U.S. at 44. (Internal quotations omitted.) Although the Court was speaking of the military judicial process at that point in the case, the reason for the rule is equally applicable to exhaustion of the military's administrative process.

It is conceded by the government New completed the available administrative procedures, though they were admittedly informal. The court of appeals held that unless administrative appeals are *exhaustive* comity applies. This Court, however, has ruled that it such appeals need only be

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[6]129 F.3d. at 644

exhausted. New did just that. Therefore, his habeas petition is governed by *Parisi*.

D.

MILITARY COURTS HAVE NEITHER SPECIAL EXPERTISE NOR CONSTITUTIONAL COMPETENCE OVER NEW'S CLAIMS

In *Noyd v. Bond*, 395 U.S. 683, 696 n.8 (1969) this Court said that it recognized an exception to the rule of comity in *Toth* and *Reid*: "because we did not believe that the expertise of military courts extended the consideration of the type presented."

In *Councilman*, this Court found that the "service-connected" argument relied upon by the serviceman in that case "turns in major part on gauging the impact of an offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts." Because such "matters of judgment . . . often turn on the precise set of facts in which the offense occurred," this Court concluded that "they are matters as to which the expertise of military courts is singularly relevant, and their judgments indispensable to inform any eventual review in Art. III courts." 420 U.S. at 760.

In the court below, the government cited 81 cases in support of its positions both on the jurisdictional questions and on the merits. Not a single citation is from a military court. Without any reliance on military court decisions, even on the merits, it is difficult for the government to argue that the kinds of questions petitioner has raised fall within the

special expertise of the military tribunals. The reason that there are no such citations is that this case concerns the proper division of power between the president and Congress concerning the deployment of our military under foreign command. Article I courts not only lack expertise on such questions, they lack both the independence and constitutional competence to decide such questions.

Military courts have no competence over legal and constitutional questions that are unrelated to the primary purpose of those tribunals. As this Court pointed out in *Toth*, military tribunals are restricted "to the narrowest jurisdiction deemed absolutely essential to the maintaining discipline among the troops in active service." 350 U.S. at 22. And as this Court further observed in *Reid*:

> Traditionally, military justice has been a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness within the ranks. Because of its very nature and purpose the military must place great emphasis on discipline and efficiency. Correspondingly, there has always been less emphasis in the military on the rights of the individual than in . . . civilian courts.

354 U.S. at 35-36.

What this Court said in *Reid* about military justice is especially relevant to this case. In his military trial, New attempted to raise his constitutional and legal objections to the power of the president unilaterally order his unit to don the United Nations uniform and to serve under United Nations command. The military trial judge simply refused to address these objections, ruling that such claims could not —

under the normal rules governing prosecutions for disobedience of a lawful order — be entertained. Hence, the trial judge ruled, in effect, that the order commanding New to become a United Nations soldier was conclusively presumed to be lawful. Such a presumption may be permissible when applied to the run-of-the-mill order touching on the daily lives of an American soldier, but not when applied to an order to transfer an American soldier's allegiance from the United States Constitution and the President of the United States to the United Nations Charter and the Secretary-General.

Not only are the courts-martial rules and procedures inapt to resolve questions going to the statutory and constitutional authority of the president to place American servicemen under foreign command, but military judges are in no position to render the kind of independent legal review and judgment that the Constitution has ordained for such questions. Again what this Court said in *Toth* and *Reid* is controlling.

In *Toth,* this Court observed that the authority to establish military courts, conferred upon Congress by Article I, § 8, Clause 14, is an exception to the general conferral of judicial power upon courts by Article III. As to the former, then, the power must be narrowly construed lest military jurisdiction encroach upon the "primary, indeed the sole business of . . . [Article III] courts to try cases and controversies between . . . individuals and the Government." 350 U.S. at 15. In *Reid,* this Court explained the importance of this constitutional limitation upon the extent of the authority of courts-martial:

> They have always been subject to varying degrees of "command influence." In essence, these tribunals are

> simply executive tribunals whose personnel are in the executive chain of command . . . . [T]he members of a courts-martial, in the nature of things, do not and cannot have the independence . . . of civilian judges.

354 U.S. at 36.

New challenges an order, which the government concedes ultimately came from the president, to become "both a U.S. soldier and a UN soldier." Based on Article I § 9 and enforcing statutes, and regulations,[7] New argues that he cannot assume the office of "UN soldier" or wear the uniform items connected with this office because Congress has not consented. Whether or not the president can circumvent the power of Congress and these constitutional and statutory requirements is an issue involving the expertise of Article III courts, not military tribunals.

New also claims that the deployment of his unit under UN command violates the United Nations Participation Act. The UNPA requires the approval of Congress for any deployment under Chapter VII of the UN Charter. The UN itself asserts Chapter VII as the authority for the challenged deployment. Congress has not approved this arrangement. Again, the question of whether the president may bypass both the law and the power of Congress is a question squarely

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[7]Federal law bans any federal employee from accepting "decorations" from foreign governments. 5 U.S.C. § 7342. "Decorations" are defined to include "insignia." 5 U.S.C. § 7342(a)(4). All military personnel are subject to this ban. § 7342(a)(1)(D). The United Nations is clearly defined as a "foreign government." § 7342(a)(2). Army Regulation 670-1 Para. 3-4 k. governs insignia to be worn on the Battle Dress Uniform: "Foreign badges, distinctive unit insignia, and regiment distinctive insignia will not be worn on these uniforms."

within the expertise of the federal courts and wholly outside the competence of courts-martial.

Even the affirmative defense raised by the government, that New's claims present nonjusticiable political questions—a defense raised in the military courts as well as below—cannot possibly be said to reside within the special expertise of the military courts. By nature, political question issues explore the role between Article III courts and the executive or legislative branches. Military courts are a unit of the executive branch and have no role in deciding the extent of Article III judicial competence over the acts of the Commander-in-Chief, especially in the face of claims that his acts conflict with the power of Congress.

In short, the military tribunals are not designed to exercise the independent judgment that is called for when a defendant has raised statutory and constitutional questions about the powers of their own Commander-in-Chief. Only Article III courts are constituted to judge such matters free from "command influence." To require New to adjudicate his claims that the president may not unilaterally place him under United Nations command in violation of the United Nations Participation Act and in violation of Article II, Section 2 of the Constitution is not only an exercise in futility, but "especially unfair." See *Noyd v. Bond, supra,* 395 U.S. at 696, n. 8. Therefore, like the petitioners in *Toth* and *Reed*, New need not complete his military judicial appeals before he may obtain an Article III court decision on the merits of his claims.

II.

THIS CASE PRESENTS AN IMPORTANT ISSUE OF SEPARATION OF POWERS THAT SHOULD BE RESOLVED BY THIS COURT

Over twenty years have gone by since this Court rendered its decision in *Schlesinger v. Councilman.* Since then, this Court has not handed down a significant ruling delineating the jurisdictional relationship between the military court system and Article III courts. If the opinion of the court below is allowed to stand, it will send a signal that this Court no longer considers significant the constitutional limitations on military courts that it recognized and enforced in *Parisi* and in *Toth, Reid,* and *Billings.* This Court should not allow that to happen. Otherwise, the very limited jurisdiction conferred upon Congress to create a military court system under Article I, Section 8 threatens to swallow up the primary judicial authority conferred upon the federal judiciary by Article III, Sections 1 and 2.

Given the constitutional commitment to separation of powers, this Court ruled that no one should have to run the gauntlet of a court-martial system that is neither fashioned nor structured to address the substantive legal and constitutional claims that lie at the heart of a total jurisdictional challenge. *Noyd, supra,* 395 U.S. 696, n. 8.

In *Federalist No. 78,* Alexander Hamilton argued that "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution." Further, he pointed out that the limits placed by that Constitution on the other branches of Government "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void." Finally, he

concluded that "[w]ithout this [independence], all the reservations of particular rights or privileges would amount to nothing."

What Hamilton wrote over two hundred years ago is as true today as then, and is of particular relevance and importance in this case. At stake here are claims that go to the very core of Michael New's oath as an American soldier —"to support and defend the Constitution of the United States . . . and to obey the orders of the president of the United States" according to the rule of law.

By blending all three functions of government—legislative, executive and judicial—the court-martial system does not afford the essential independence that Article III courts offer "to keep . . . [the government] within the limits of their [constitutional] authority." *Federalist No. 78.* Moreover, by operating under the "'command influence'"of the president, the court-martial system does not provide the essential impartiality that Article III courts provide in "the even scales of justice." *Reid, supra,* 354 U.S. at 36, 38. To deny Michael New of a right to be heard now in an Article III court is tantamount to a deprivation of his liberty without due process of law.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

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APPENDIX

MICHAEL G. NEW, APPELLANT
v.
WILLIAM S. COHEN, SECRETARY OF DEFENSE
AND TOGO D. WEST, JR.,
SECRETARY OF THE ARMY,
APPELLEES

No. 96-5158

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

September 26, 1997, Argued
November 25, 1997, Decided

Before: EDWARDS, Chief Judge, GINSBURG and TATEL, Circuit Judges.
Opinion for the Court filed by Chief Judge EDWARDS.

EDWARDS, Chief Judge: Michael G. New was serving in the United States Armed Forces as a Medical Specialist in August 1995 when he received notice that his unit was to be deployed to the Republic of Macedonia as part of the United Nations Peacekeeping Force ("U.N. Force"). Subsequently, Specialist New refused to follow orders to appear in formation wearing U.N. insignia and headgear. His brigade commander charged him with failure to obey a direct, lawful order, a violation of Article 92 of the Uniform Code of Military Justice. Shortly before his court-martial, New petitioned for a writ of habeas corpus in the United States District Court, contending that the orders in question (1) violated the Constitution, federal law, and his enlistment contract and oath, (2) impermissibly contemplated his transformation into a U.N. soldier, and, therefore, (3) converted his status from soldier to civilian. New claimed

that he was entitled to an immediate honorable discharge. See Petition for a Writ of Habeas Corpus ("Habeas Petition"), Joint Appendix ("J.A.") 2. The District Court, in a decision issued after the court-martial trial but before military appeals were completed, refused to reach the merits of New's petition for habeas corpus, holding that the equitable principle of comity required the court to stay its hand pending the military proceedings. See United States ex rel. *New* v. *Perry*, 919 F. Supp. 491, 500 (D.D.C. 1996).

We affirm the District Court's dismissal of New's habeas petition on the ground that he has failed to exhaust his remedies in the pending court-martial action. In so holding, we follow the basic principle of comity set forth in *Schlesinger* v. *Councilman*, 420 U.S. 738, 43 L. Ed. 2d 591, 95 S. Ct. 1300 (1975), that service members subject to military discipline must exhaust their military remedies before seeking collateral review in federal court. Because New has not completed the appeals of his court-martial conviction within the military justice system, he currently is barred from pursuing an action on a habeas corpus petition in District Court.

I. BACKGROUND

Specialist New enlisted in the United States Army for an eight-year term, four years of which were to be served in the "Regular component of those forces," beginning on February 18, 1993. *New*, 919 F. Supp. at 492. After receiving basic training and Medical Specialist training, he was deployed for two months to Kuwait and then, in July 1995, to Germany. Id. at 493. On August 21, 1995, New was informed that his unit would be deployed in October of that year as part of the U.N. Force. Id. New learned that, as a member of that force, he would be required to wear a

U.N. shoulder patch on his uniform and distinctive, blue U.N. headgear.

New objected to the particular uniform requirements as unlawful. He informed his squad leader and platoon leader that he would not comply with those requirements unless they were shown to be justified by constitutional authority. New's superiors responded by ordering him to rethink his position in light of the history and objectives of the U.N. Charter. New also received counseling by three non-commissioned officers in the chain of command and a warning that he would be subject to discipline if he disobeyed the order to wear the U.N. insignia. On September 19, 1995, New submitted a written statement of protest ("Statement") to his superior officers, in which he indicated a belief that the U.N. Charter was inconsistent with the United States Constitution. In addition, he repeated his objection to the wearing of U.N. accoutrements, stating that he interpreted the wearing of a uniform as a sign of allegiance to the authority "so signified or which issues that uniform," and that, therefore, he could not wear the accoutrements because he was "not a citizen of the United Nations . . . not a United Nations Fighting Person [and has] never taken an oath to the United Nations." Statement, J.A. 147. In the Statement, he also wrote that, "in order to avoid controversy or to avoid placing the Army in a bad light," he had requested a transfer to another unit or, reluctantly as an alternative, an honorable discharge. Id. According to New, the Army had denied both of these requests. Id.

On October 2, 1995, New, along with the rest of his battalion, attended an information briefing on the legal bases for the deployment of American troops as part of the U.N. Force in Macedonia. At the briefing, and again at a company formation two days later, the soldiers who were to

be deployed to Macedonia were ordered to appear on October 10, 1995, wearing the U.N. arm patches and headgear. 919 F. Supp. at 493.

New appeared in formation on October 10, 1995 wearing a uniform that did not display the ordered accoutrements. He was subsequently charged with an Article 92 violation, and a trial by court-martial was set to follow. On January 16, 1996, he moved in the District Court for an emergency stay of the court-martial and petitioned for a writ of habeas corpus. The Court heard oral argument and denied the stay. Memorandum Opinion and Order of January 16, 1996, J.A. 123-24. Afterwards, New was convicted by a court-martial jury and sentenced to a bad conduct discharge. J.A. 84-85.

In his petition for habeas corpus, New contended that he was "entitled to an immediate honorable discharge" on the theory that the United States illegally had attempted to transform him into a U.N. soldier. Habeas Petition, J.A. 2. This attempted transformation was prohibited, according to New, for three reasons. First, he claimed that the United States Constitution, federal statutes, and applicable regulations prohibited the acceptance by federal employees, including uniformed members of the Army, of "any present or emolument . . . from a foreign government without the consent of Congress." Id. at 6. Second, New argued that the President of the United States was prohibited by the United States Constitution and sections 6 and 7 of the United Nations Participation Act of 1945 ("Participation Act"), as amended, 22 U.S.C. §§ 287d to d-1 (1994), from deploying United States troops as part of the U.N. Force in Macedonia unless he first obtained the consent of Congress, which he allegedly had not done. Habeas Petition, J.A. 7. Finally, New contended that the orders relating to his deployment

and wearing of U.N. accoutrements conflicted with and breached his enlistment contract. Id. at 8-9. New asserted that the unlawful orders absolved him of his remaining obligation to serve in the Army; changed his status such that he was a civilian, not subject to a court-martial; and entitled him to an honorable discharge. Id. at 2.

On March 28, 1996, in a published opinion, the District Court denied New's petition for habeas corpus. See *New*, 919 F. Supp. at 500. The trial court held that the equitable principle of comity prevented it from considering New's claims until all military appeals had run their course. Id. Subsequently, on June 12, 1996, the court-martial convening authority approved New's bad conduct discharge. J.A. 149; Appellant's Br. at 6; Appellee's Br. at 4. New's conviction by court-martial and the resulting sentence are subject to review by the Army Court of Criminal Appeals. See 919 F. Supp. at 494 (describing pending military proceedings). If that appeal is unsuccessful, New may seek discretionary review in the Court of Appeals for the Armed Forces, which is composed of civilian judges. Id. New now appeals the District Court's denial of his petition for a writ of habeas corpus.

II. ANALYSIS

A. The Applicable Case Law

1. The Basic Principles of Comity

In *Parisi* v. *Davidson*, 405 U.S. 34, 31 L. Ed. 2d 17, 92 S. Ct. 815 (1972), the Supreme Court outlined the "basic principles of comity that must prevail between civilian courts and the military judicial system." Id. at 46. At the heart of these principles is the general rule that a federal court must

await the final outcome of court-martial proceedings in the military justice system before entertaining an action by a service member who is the subject of the court-martial. Although this rule often "is framed in terms of 'exhaustion,' it may more accurately be understood as based upon the appropriate demands of comity between two separate judicial systems." Id. at 40.

The Court in *Parisi* allowed the petitioner in that case–a service member seeking discharge as a conscientious objector–to pursue a habeas corpus petition in federal court even though court-martial charges were still pending against him. The Court concluded that the demands of comity did not require dismissal of Parisi's habeas petition, because he had fully exhausted the administrative procedures that were in place for review of claims by persons seeking discharge as conscientious objectors. Since the Court found that "courts martial are not convened to review and rectify administrative denials of conscientious objector claims or to release conscientious objectors from military service," id. at 42, it followed that the petitioner was not required to await the disposition of a court-martial charge before seeking habeas relief in federal court. However, the Court in *Parisi* made it clear that the decision, which merely "recognized the historic respect in this Nation for valid conscientious objection to military service," id at 45, was narrow and "should not be understood as impinging upon the basic principles of comity," id. at 46.

Any doubt about the narrow reach of the judgment in *Parisi* was put to rest in *Schlesinger* v. *Councilman,* 420 U.S. 738, 43 L. Ed. 2d 591, 95 S. Ct. 1300 (1975). In Councilman, the Court reaffirmed the general rule that "federal courts normally will not entertain habeas petitions by military prisoners unless all available military remedies

have been exhausted." Id. at 758; see also *Noyd* v. *Bond,* 395 U.S. 683, 693-98, 23 L. Ed. 2d 631, 89 S. Ct. 1876 (1969); *Gusik* v. *Schilder,* 340 U.S. 128, 95 L. Ed. 146, 71 S. Ct. 149 (1950). This rule was seen to be grounded in the same "considerations of comity," Councilman, 420 U.S. at 756, alluded to in *Parisi.*

Councilman indicates that there are two principal reasons why considerations of comity normally preclude a federal court from intervening in a pending court-martial proceeding. First, the military justice system must remain free from undue interference, because "the military is a 'specialized society separate from civilian society' with 'laws and traditions of its own developed during its long history.' " Id. at 757 (quoting *Parker* v. *Levy,* 417 U.S. 733, 743, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974)). Second, Congress sought to balance the competing interests in military preparedness and fairness to service members charged with military offenses, by "creating an integrated system of military courts and review procedures." 420 U.S. at 758. "It must be assumed that the military court system will vindicate servicemen's constitutional rights." Id. Thus, as suggested in *Parisi,* the doctrine of comity aids the military judiciary in its task of maintaining order and discipline in the armed services, eliminates needless friction between the federal civilian and military judicial systems, and gives due respect to the autonomous military judicial system created by Congress. *Parisi,* 405 U.S. at 40.

2. The Concept of Exhaustion

"The concept of 'exhaustion' in the context of the demands of comity," *Parisi,* 405 at 40 n.6, is in part justified by the same "practical considerations" that justify exhaustion of administrative remedies generally, namely the

"need to allow agencies to develop the facts, to apply the law in which they are peculiarly expert, and to correct their own errors." Councilman, 420 U.S. at 756; see also id. at 758. In connection with court-martial proceedings, the exhaustion requirement is particularly important, because, given the reality that the military must "prepare for and perform its vital role" of fighting wars, it "must insist upon a respect for duty and a discipline without counterpart in civilian life." Id. at 757. Congress recognized these pressing needs when it created an integrated system of military courts and review procedures. Id. at 758.

The Court in Councilman concluded that the same principles supporting the exhaustion requirement for habeas petitions by service members also governed the proper exercise of the federal courts' equitable jurisdiction over pending court-martial proceedings. Absent truly compelling circumstances, service members are precluded from bringing suit in federal court seeking to enjoin court-martial proceedings on jurisdictional or other grounds, just as they are barred from seeking collateral review of their court-martials before they have exhausted their appeals within the military system. Accordingly, the Court set forth the rule that "when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise." Id.

The exhaustion requirement prevented the District Court in Councilman from hearing a suit for injunctive relief brought by an Army captain against whom court-martial charges had been preferred for drug-related activities. The Army captain had claimed in his petition that the offenses charged were not "service connected" and hence were not

within court-martial jurisdiction. Id. at 741-42. The Court held that this jurisdictional challenge, although not without support, first had to be fully considered by military authorities, and that the service member had to exhaust any other military remedies that were available to him before a federal court could exercise collateral review over the proceedings. Id. at 759-61.

3. Exceptions to the Rule of Comity

As noted above, at the heart of the comity doctrine is the general rule that a federal court must await the final outcome of court-martial proceedings in the military justice system before entertaining an action by a service member who is the subject of the court-martial. There are two principal exceptions to this rule. One is noted in *Parisi,* where the Court held that, "under accepted principles of comity, the court should stay its hand only if the relief the petitioner seeks-discharge as a conscientious objector–would also be available to him with reasonable promptness and certainty through the machinery of the military judicial system in its processing of the court-martial charge." 405 U.S. at 41-42. It is clear from the Court's decision, however, that the *Parisi* exception–allowing a service member to pursue a collateral attack challenging a military action before the completion of court-martial proceedings–is limited to situations in which: (1) a service member subject to military authority asserts a legal right against the military that has been clearly established by statute, regulation, or other applicable law; (2) administrative procedures are in place to enforce that right; and (3) the service member has fully exhausted these procedures and has been denied the relief attendant to the right asserted.

In claiming that he wrongly was denied conscientious

objector status, the service member in *Parisi* asserted a right clearly recognized by military regulations. See 405 U.S. at 38 n.2 (citing Department of Defense Directive No. 1300.6 (May 10, 1968)). Moreover, because the service member in *Parisi* had exhausted his administrative remedies for release from the military based on this asserted right, the district court had no good reason to stay its hand pending the court-martial proceedings. The Supreme Court considered and rejected comity as a reason for denying the habeas petition, given that the relief sought by the service member–discharge as a conscientious objector–could not be obtained through the military judicial system. Id. at 41-42. It is true, as the Court recognized in *Parisi,* that "the writ of habeas corpus has long been recognized as the appropriate remedy for servicemen who claim to be unlawfully retained in the armed forces." Id. at 39 (citations omitted). But the Court in *Parisi* also made it clear that the decision in the case "should not be understood as impinging upon the basic principles of comity that must prevail between civilian courts and the military judicial system." Id. at 46. Indeed, it is implicit in the Court's decision in Councilman that any attempt to extend the *Parisi* exception beyond the circumstances of that case would wreak havoc on military discipline.

The second exception to the exhaustion rule is quite simple: a person need not exhaust remedies in a military tribunal if the military court has no jurisdiction over him. In other words, the military has no authority to subject civilians to court-martial proceedings. See, e.g., *McElroy* v. *Guagliardo,* 361 U.S. 281, 4 L. Ed. 2d 282, 80 S. Ct. 305 (1960); *Reid* v. *Covert,* 354 U.S. 1, 1 L. Ed. 2d 1148, 77 S. Ct. 1222 (1957); *Toth* v. *Quarles,* 350 U.S. 11, 100 L. Ed. 8, 76 S. Ct. 1 (1955). In the cases embracing this exception, it has been undisputed that the persons subject to

the court-martials either never had been, or no longer were, in the military. The Court in Councilman held that those cases, in which "'the complainants raised substantial arguments denying the right of the military to try them at all,' " 420 U.S. at 759 (quoting *Noyd,* 395 U.S. at 696 n.8) (emphasis added), were plainly distinguishable from the situation presented by a service member challenging the military's jurisdiction. The service member in Councilman, the Court noted, "was on active duty when the charges against him were brought" and hence there was "no question that he [was] subject to military authority and in proper cases to disciplinary sanctions levied through the military justice system." 420 U.S. at 759.

B. Application of the Relevant Law to Specialist New's Case

With the foregoing legal principles in mind, we now turn to consideration of New's claims before this court.

1. Comity and the Rule of Exhaustion

Given the record in this case, we hold that the District Court was fully justified in dismissing New's habeas petition on grounds of comity for lack of exhaustion. In other words, as the District Court correctly found, Councilman is dispositive of this case. When New first petitioned for habeas corpus, claiming that the military did not have jurisdiction over him and that he was entitled to an honorable discharge, he already had been charged with failing to obey orders and his court-martial was imminent. The appeal of his court-martial and the decision of the military tribunal are still pending. Moreover, New cannot demonstrate "harm other than that attendant to the resolution of his case" within the military system. 420 U.S. at 758.

Accordingly, under well established law, the District Court properly found that it lacked authority to intervene in the pending military proceedings.

2. New's Jurisdictional Challenge

New claims that the Army no longer has jurisdiction over him because of the military's allegedly unlawful attempt to require him to serve as a part of a U.N. mission. There appear to be two parts to New's claim on this point: first, the alleged unlawful action by the military relieved him from having to exhaust court-martial proceedings before filing a habeas petition in federal court; and, second, the Army's actions relieved him from all further commitments to the military and, thus, as a "civilian," he is no longer subject to court-martial. New's positions are without merit.

In Councilman, the Supreme Court made clear that military courts are capable of, and indeed may have superior expertise in, considering challenges to their jurisdiction over disciplinary proceedings. Id. at 760 (question of whether service member's alleged offense is "service related" and therefore within jurisdiction of military courts raises issues "as to which the expertise of military courts is singularly relevant"); see also *Apple* v. *Greer,* 554 F.2d 105, 109 (3d Cir. 1977) ("The claim that there is a lack of jurisdiction can be made to a military tribunal."). Thus, New must argue to the military authorities reviewing his case that the orders in question were unlawful and absolved him of any remaining military service obligations. For this court to hold otherwise would produce a rule allowing service members to circumvent the exhaustion requirement merely by contending, without reference to an applicable statute or regulation, that an action by the military "released" them from further service. This result would encourage premature

federal judicial intervention in the affairs of the military, a scenario that was expressly rejected by the Court in Councilman.

The exhaustion requirement aims to give a military tribunal a full opportunity to consider the multitudinous claims that might be brought by service members regarding the terms and conditions of their service. Comity demands that we give due respect to the military tribunal to carry out its congressionally prescribed responsibilities. If the orders resulting in New's court-martial were "unlawful," as he claims, that is a matter that can be addressed by the military tribunal in their consideration of the charges against him.

Furthermore, notwithstanding his claims to the contrary, New is still a member of the military and subject to military discipline. His contention that the disputed orders effectively discharged him from the military and rendered him a civilian before the occurrence of any administrative or judicial proceeding, and, therefore, that his case is controlled by *McElroy* v. *Guagliardo,* et al., is meritless. In his Statement submitted on September 19, 1995, New indicated that he had requested an honorable discharge as a secondary alternative to transfer to another unit; by requesting the transfer, he acknowledged that he still was a member of the military. In any event, as New's counsel conceded at oral argument, there is no authority to support the suggestion that New became a civilian immediately upon issuance of the allegedly unlawful orders. On the record at hand, it is clear that when New disobeyed his orders, he was still in the service, and he cannot now present a "substantial argument[ ]," Councilman, 420 U.S. at 759, that he is not subject to military discipline and court-martial.

3. New's Claim that he is Covered by the *Parisi* Exception

New advances the further argument that his situation resembles that of the service member in *Parisi,* and, therefore, he should be allowed to bring a habeas petition in federal district court notwithstanding the pending court-martial proceeding. We reject this contention, for it is clear that New can find no-solace in *Parisi.*

The service member in *Parisi* had initiated an application for discharge as a conscientious objector nine months after his induction into the Army as a draftee, but before he committed the allegedly wrongful act (refusing to board an airplane for Vietnam) that led to his court-martial. 405 U.S. at 35-36. While the appeal of his court-martial conviction was still pending, the Army made a final decision denying him conscientious objector status. In concluding that the district court should hear the service member's petition even though the Army had not yet issued a final determination on his court-martial charges, the Supreme Court reasoned that the service member's petition for habeas corpus was based on the Army's refusal of his application for discharge as a conscientious objector–an application which "antedated and was independent of the military proceedings" related to his court-martial. Id. at 41. Hence, the "case [did] not concern a federal district court's direct intervention in a case arising in the military court system." Id. (citations omitted). The doctrine of comity was seen to have no application in *Parisi* because the military tribunal could not award the service member the desired relief–conscientious objector discharge–in conjunction with the court-martial proceedings. Id. at 41-44.

New argues that *Parisi* controls his case because his

petition for habeas corpus constitutes a collateral attack on the Army's allegedly wrongful denial of his claim for discharge. New says his claim was presented prior to his disobeying the orders to appear in formation wearing U.N. accoutrements. According to New, he "initiated his request for reassignment or for an honorable discharge" six weeks before his court-martial, when he first objected to the deployment to Macedonia and wearing of U.N. accoutrements as unlawful. Appellant's Br. at 13. Moreover, he "sought further review from his superior officers up the chain of command" on September 19, 1995 by submitting the Statement. Id. at 14. The fact that he took no further action on his request for discharge was excusable, he contends, for the simple reason that, as noted by the District Court, there were no formal procedures for him to pursue. 919 F. Supp. at 497; Appellant's Br. at 11-12.

New's reliance on *Parisi* is misplaced. Assuming, arguendo, that the military tried to transform him into a U.N. soldier, or that it otherwise issued him illegal orders, New cannot show that he has a clearly established right to discharge from the military as a result of such actions In other words, there is no authority for the proposition that a service member who receives an illegal order is entitled to immediate discharge from the military. So even if New's substantive claims had merit, this would not provide a basis for his honorable discharge from the military.

It is also noteworthy that New concedes that there are no administrative procedures within the military to enforce the rights that he asserts. Appellant's Br. at 12. Thus, this case is controlled by Councilman, which requires New first to present his arguments about the legality of his orders as a defense to the court-martial action. Under Councilman,

New's personal beliefs about his orders afford him no immediate recourse to relief in federal court. When he disobeyed the orders of his superiors, he faced discipline and court-martial, and he cannot now seek judicial intervention before seeking relief in the system of military justice.

In addition, New's contention, tied vaguely to the judgment in *Parisi*, that the lack of administrative procedures for his claim for honorable discharge entitles him to an immediate habeas hearing, is unavailing. Upon receiving the orders which he thought to be illegal, New had two options. He could have chosen to obey the orders and then sought judicial review of the military's policies. Cf. *Goldman* v. *Weinberger,* 475 U.S. 503, 89 L. Ed. 2d 478, 106 S. Ct. 1310 (1986) (suit to enjoin application of Air Force regulation that forbade officer from wearing yarmulke while on duty and in uniform). Or he could follow the path that he took: disobey the orders and challenge their validity in the subsequent disciplinary proceedings. Having chosen the latter course of action, New might yet obtain vindication through court-martial proceedings, or he may seek collateral review in federal court following an adverse judgment by the highest military tribunal. However, any option contemplating an exception to the exhaustion requirement is foreclosed by the doctrine of comity imposed by *Parisi* and Councilman. The Court's emphasis on the need for duty and discipline in the armed forces makes clear that, absent a clearly defined right enforceable in a proceeding other than a court-martial-for example, an administrative proceeding to address a service member's conscientious objector status–the federal courts normally should not interfere with the day-to-day operations of the military services.

This rule makes sense for obvious reasons. Any other standard would invite military personnel to challenge

disfavored orders of superiors touching upon uniforms, working hours, training procedures, assignments, and a host of other matters. Such an absurd result surely was not contemplated by *Parisi*. That case was decided prior to Councilman and has been extremely limited in application. See, e.g., *Cole* v. *Spear*, 747 F.2d 217, 220 (4th Cir. 1984) (en banc) (applying *Parisi* and reversing district court's grant of discharge to conscientious objector; fact that pending disciplinary action against objector currently prevented final administrative action on her application for discharge did not constitute "valid reason to excuse her from the necessity of exhaustion"). Indeed, New's counsel could cite to no case, other than *Parisi*, justifying the claim that New should be free to challenge disfavored orders by civil action instead of court-martial.

C. Other Remedial Options Available to Specialist New

During the course of argument, New's counsel suggested that, absent consideration of his habeas petition, New would have no reasonable avenues of relief. We disagree.

After New disobeyed the disputed orders and was charged with violating Article 92 of the Uniform Code of Military Justice, he faced three potential outcomes within the military system, two of which are still possible. First, the court-martial jury could have convicted him of failing to obey a direct, lawful order and incarcerated him in military prison, and the military authorities reviewing his case could have sustained this sentence. Obviously, in this scenario–which is now foreclosed by the fact that New was convicted and sentenced only to a bad conduct discharge as opposed to confinement–New could bring a habeas petition in federal district court challenging his conviction. See *Burns* v.

Wilson, 346 U.S. 137, 139-42, 97 L. Ed. 1508, 73 S. Ct. 1045 (1953); *Curry* v. *Secretary of the Army,* 194 U.S. App. D.C. 66, 595 F.2d 873, 875 & n.8 (D.C. Cir. 1979); cf. Councilman, 420 U.S. at 747-48.

Second, New could have, and still might, prevail in his defense against the Article 92 charge. This outcome likely would render any claims in a habeas petition moot.

Finally, New still faces the possibility that the court-martial conviction and subsequent review by military tribunals and officials will result in an other than honorable discharge; this outcome, no doubt, would not vindicate all of the interests currently asserted by New. In these circumstances, New again has some options. If he suffers monetary losses as a result of his discharge, he may be able to collaterally attack the underlying conviction in the United States Court of Federal Claims. See Councilman, 420 U.S. at 748 (citing *Runkle* v. *United States,* 122 U.S. 543, 30 L. Ed. 1167, 7 S. Ct. 1141 (1887)); 420 U.S. at 751; *Matias* v. *United States,* 923 F.2d 821, 822-25 (Fed. Cir. 1990) (exercising jurisdiction over former service member's back pay claim challenging court-martial conviction); *Bowling* v. *United States,* 713 F.2d 1558, 1561 (Fed. Cir. 1983).

New also might be able to bring an action in district court seeking nullification of the conviction underlying his bad conduct discharge. See *Hatheway* v. *Secretary of the Army,* 641 F.2d 1376, 1379 (9th Cir. 1981) ("The district court had equitable jurisdiction under 28 U.S.C. § 1331 and mandamus jurisdiction under § 1361."); *Kauffman* v. *Secretary of the Air Force,* 135 U.S. App. D.C. 1, 415 F.2d 991, 994 (D.C. Cir. 1969) (action to have court-martial conviction and sentence declared void); *Williamson* v. *Secretary of the Navy,* 395 F. Supp. 146, 147 (D.D.C. 1975)

(exercising jurisdiction to review court-martial under 28 U.S.C. § 1331, citing *Kauffman*); 2 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 26-11.00, at 181 (1991).

In delineating these scenarios, however, we do not mean to suggest that New's claims have merit or that a federal court would even reach the merits of his arguments. New argues on appeal, as he did in substantial part before the District Court, that the orders relating to his deployment and wearing of U.N. insignia were illegal on the grounds that: (1) the wearing of the insignia violates the United States Constitution's prohibition on office holders from accepting titles or offices from foreign states without Congressional consent, see U.S. CONST., art. I, § 9, cl. 8, and also violates federal law and military dress regulations; (2) the President did not have power under sections 6 and 7 of the Participation Act, 22 U.S.C. §§ 287d to d-1, to deploy U.S. soldiers as part of the U.N. Force without Congressional consent; and (3) the contested orders breached New's enlistment contract and deprived him of basic rights as a soldier and a citizen.

It is difficult to see how any of these allegations, even if shown to be true, would support New's contention that he is entitled to an honorable discharge from the military. New points to no legal authority supporting the proposition that unlawful orders potentially can transform a service member's "status" to that of a civilian. Indeed, as the District Court pointed out, case law suggests that military enlistment is a special sort of contract "which changes the status, and where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes." *United States* v. *Grimley,* 137 U.S. 147, 151, 34

L. Ed. 636, 11 S. Ct. 54 (1890); see *Bell* v. *United States,* 366 U.S. 393, 402, 6 L. Ed. 2d 365, 81 S. Ct. 1230 (1961); *New,* 919 F. Supp. at 498.

In any event, questions related to the legality of the deployment of troops to Macedonia and the orders to wear U.N. accoutrements need not be reached in this appeal, because New has failed to exhaust his remedies for relief in the pending court-martial action.

III. CONCLUSION

For the reasons given above, we affirm the judgment of the District Court dismissing New's petition for habeas corpus on grounds of comity.

THE UNITED STATES EX REL. MICHAEL G. NEW, Petitioner,

v.

WILLIAM PERRY and TOGO WEST, Respondents.

Civil Action No. 96-0033 PLF

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

March 28, 1996, DATE
March 28, 1996, FILED

PAUL L. FRIEDMAN, United States District Judge

Army Specialist Michael G. New voluntarily enlisted in the United States Armed Forces for an eight year term, four of which must be served in the "Regular component of those forces," beginning on February 18, 1993. Pet.'s Ex. A, Enlistment Agreement. On January 13, 1996, just under three years after he reported for duty, Specialist New asked this Court to halt pending court martial proceedings against him and to remove him from the jurisdiction of the military justice system. The court martial concerned Michael New's refusal to comply with an order to appear in military formation on October 10, 1995, wearing a United Nations' cap and shoulder patch on his uniform in preparation for deployment as a member of a United Nations Peacekeeping Force in the former Yugoslav Republic of Macedonia. Pet.'s Ex. E, Charge Sheet.

Specialist New refused to obey the order because he contended that it was unlawful for him to wear the badges or accept the office of a foreign government. He sought an

emergency stay of the court martial in this Court, arguing that the combination of wearing United Nations' accouterments on his uniform, carrying United Nations' identification, serving under United Nations' operational control and being subject to new codes of conduct and protections would transform him from his status as a member of the United States Armed Forces into that of a member of a United Nations force. Imposing this transformation in status upon him, argued Specialist New, breached his enlistment contract and, as a result of the breach, restored him to civilian status, making him no longer subject to court martial. He also contended that the order deploying members of his unit to the Republic of Macedonia was illegal because the United Nations Participation Act of 1945, as amended, 22 U.S.C. § 287, does not permit the President of the United States to deploy troops to serve under foreign command without the consent of Congress. In addition to his motion for an emergency stay of the court martial, Specialist New petitioned the Court for a writ of habeas corpus and an honorable discharge from the Army. The Court refused to interrupt the court martial proceeding and denied the motion for a stay. It now considers Specialist New's petition for a writ of habeas corpus.

I. BACKGROUND

Michael G. New reported for active duty on February 18, 1993. Pet.'s Ex. A. He received basic training at Fort Leonard Wood, Missouri, and Medical Specialist training at Fort Sam Houston in Houston, Texas. Thereafter, Specialist New was assigned to Fort Bliss, Texas, and deployed for two months to Kuwait. In July 1995, Specialist New was assigned to the Federal Republic of Germany as a Medical Specialist.

On August 21, 1995, Specialist New was informed that his unit was to be deployed in October 1995 to the Republic of Macedonia as part of a United Nations Peacekeeping Force. Members of his unit were told that they would be required to wear the shoulder-patch and headgear of the United Nations throughout the deployment. Specialist New, believing the order was unlawful, informed his squad leader and platoon leader that he would not wear U.N. insignia until he was provided with constitutional authority for the order.

Specialist New was ordered to examine the United Nations Charter, its history and objectives and to rethink his position. On September 6, 1995, he was counseled by three non-commissioned officers in his chain of command. He was informed that the U.N. arm patch and headgear served to distinguish United States soldiers from warring factions in the Republic of Macedonia and that he would be subject to discipline if he disobeyed the order to wear such accouterments. Resp.'s Exs. 1-4, Counseling Reports. On September 19, 1995, Specialist New submitted a statement to superior officers in his chain of command indicating that he viewed the U.N. Charter to be inconsistent with the United States Constitution and his oath of enlistment. He wrote in relevant part:

2. . . . I interpret the wearing of a uniform, or the accouterments of a uniform, as a sign of allegiance and faithfulness to the authority or power so signified or which issues that uniform. I am an American who was recruited for and voluntarily joined the U.S. Army to serve as an American soldier. I am not a citizen of the United Nations. I am not a United Nations Fighting Person. I have never taken an oath to the United Nations, but I have taken the required oath to support and defend the Constitution of the

United States of America.

3. I am not trying to avoid a difficult or dangerous assignment or to get out of the Army. I served in Kuwait last year and have offered to serve anywhere in the world, in my American uniform, in the capacity as a U.S. Army medic under American command and U.S. Constitutional protections. I have worked diligently to be a good soldier, and have received early promotion and recognition for my efforts. . . . In order to avoid controversy or to avoid placing the Army in a bad light, I have requested a transfer to a unit that is not required to wear the U.N. uniform. I was told that such was not possible and I was even reluctantly willing to accept an honorable discharge, and I was willing to sadly and reluctantly withdraw from the U.S. Army quietly. That request was also denied. However, I will not wear a UN [sic] uniform or serve under UN [sic] Command, and I will strongly contest any discharge that is less than honorable. Pet.'s Ex. C, Statement of Michael New.

On October 2, 1995, Specialist New and the rest of his battalion attended an "Information Briefing" on the legal bases for the deployment of American troops to the former Yugoslav Republic of Macedonia as part of the United Nations Peacekeeping Force. The soldiers who were being deployed to the Republic of Macedonia were ordered to appear in formation on October 10, 1995, in the uniform specified for the deployment, i.e., bearing U.N. arm patches and headgear. Resp.'s Ex. 5, Statement of Stephen Layfield. That order was repeated at a military company formation on October 4, 1995. Resp.'s Ex. 6, Statement of Roger H. Palmateer.

Specialist New appeared in formation on October 10,

1995, but did not wear the prescribed uniform. He was charged with failing to obey a direct, lawful order, a violation of Article 92 of the Uniform Code of Military Justice. Pet.'s Ex. E, Charge Sheet. Specialist New was arraigned on November 17, 1995. He moved to dismiss the charges against him, arguing that the order was unlawful and raising many of the same arguments contained in his petition for a writ of habeas corpus. See Pet.'s Exs. H and J, Memoranda in Support of Motion to Dismiss. On January 16, 1996, he moved in this Court for an emergency stay of the court martial and petitioned for a writ of habeas corpus. The Court heard oral argument and denied the motion for a stay because the novelty of Specialist New's arguments led the Court to conclude that Michael New was unable to demonstrate a likelihood of success on the merits of his petition, because he was unable to demonstrate any risk of irreparable harm and because the public interest clearly lay in permitting the court martial proceeding to go forward. Memorandum Opinion and Order of January 16, 1996.

After a court martial proceeding on the merits, Specialist New was sentenced to a bad-conduct discharge. Resp.'s Exs. 8 and 9, Findings and Sentence Worksheets. Review of the court martial decision by the Army Court of Criminal Appeals has not yet occurred. After that appeal, Specialist New may seek discretionary review in the Court of Appeals for the Armed Forces, which is composed of civilian judges, and, possibly, in the United States Supreme Court (although the Supreme Court will not consider a petition for certiorari if the Court of Appeals for the Armed Forces denies the petition to review). In the meantime, Specialist New remains on active duty, is not incarcerated and continues to receive his standard pay. Resp.'s Ex. 10, Declaration of Gregory T. Baldwin; Resp.'s Ex. 11, Affidavit of Chris Cassin. He is working, however, as a file

clerk rather than as a Medical Specialist.

Specialist New seeks dismissal of the charges against him on the grounds that the unlawful orders changed his status such that he is a civilian and not subject to court martial. He seeks a release from the remaining five years of his term of enlistment by way of an honorable discharge from the Army. The United States insists that Specialist New is a member of the Armed Forces until the Army releases him from his commitment and that the Court therefore should refrain from dealing with the merits of petitioner's arguments and let the military justice system proceed unhindered.

II. JURISDICTION

Article I of the Constitution authorizes Congress to subject persons in the military to trial by court martial for military offenses. *Toth* v. *Quarles,* 350 U.S. 11, 14, 100 L. Ed. 8, 76 S. Ct. 1 (1955). And military courts "have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." *Burns* v. *Wilson,* 346 U.S. 137, 143, 97 L. Ed. 1508, 73 S. Ct. 1045 (1953). Civilians, however, are entitled to have the benefit of additional safeguards afforded those tried in civil courts authorized by Article III of the Constitution; thus civilians may not be subjected to trial by court martial. *Toth* v. *Quarles,* 350 U.S. at 23; *McElroy* v. *Guagliardo,* 361 U.S. 281, 4 L. Ed. 2d 282, 80 S. Ct. 305 (1960).

Army Specialist New concedes that he "submitted himself personally to the jurisdiction of the military courts by signing the United States Armed Forces Enlistment Contract and entering into active duty as a member of the nation's armed forces." Pet.'s Mem. in Support of Pet. at

8. He contends, however, that the military no longer has any authority over him because the Army tried to transform him into a United Nations soldier when it ordered him to wear United Nations' insignia on his uniform, carry a United Nations' identity card and serve as a member of the United Nations Peacekeeping Force. He says that those orders effected a breach of his enlistment contract and changed his status from U.S. military to civilian, thereby depriving the military courts of jurisdiction. He further contends that the orders are unlawful because the acceptance of the emblems and office of a foreign government is prohibited by the United States Constitution, federal statutes and regulations, and because the President of the United States is prohibited by the United Nations Participation Act from deploying United States troops to serve in a foreign force unless he obtains the consent of Congress (which has not been obtained here). n1 As a result of the alleged breach, and restoration to civilian status, he maintains that he is being unlawfully retained in the United States Armed Forces and is entitled to habeas corpus.

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n1 The parties agree that the legality of the order under the United Nations Participation Act may turn on whether the deployment to Macedonia is under Chapter VI (noncombatant assistance) or Chapter VII (armed forces) of the United Nations Charter. Compare 22 U.S.C. § 287d (Chapter VII) with 22 U.S.C. § 287d-1 (Chapter VI). President Clinton has stated in a letter to the Speaker of the United States House of Representatives that the Macedonia operation is brought under Chapter VI and thus does not require congressional approval. Resp.'s Ex. 15.

----------End Footnotes----------

Specialist New brings this habeas corpus action under 28 U.S.C. § 2241; a petition for a writ of habeas corpus is recognized as an appropriate remedy for servicemen who claim to be unlawfully retained in the Armed Forces. *Parisi* v. *Davidson,* 405 U.S. 34, 39, 31 L. Ed. 2d 17, 92 S. Ct. 815 (1972). The United States does not deny that the Court would have habeas corpus jurisdiction, but argues that principles of equitable jurisdiction counsel against the Court accepting jurisdiction until after the military justice system has finished reviewing Specialist New's court martial conviction.

The military justice system was established pursuant to Article I of the United States Constitution and is governed by the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 801, et seq. In enacting the UCMJ, Congress attempted to balance . . . military necessities against the equally significant interest of ensuring fairness to servicemen charged with military offenses, and to formulate a mechanism by which these often competing interests can be adjusted. As a result, Congress created an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals, consisting of civilian judges "completely removed from all military influence of persuasion," who would gain over time thorough familiarity with military problems. . . . Implicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task. *Schlesinger* v. *Councilman,* 420 U.S. 738, 757-58, 43 L. Ed. 2d 591, 95 S. Ct. 1300 (1974). Military courts are able to respond to the peculiar character of the military which, in order to

"prepare for and perform its vital role, . . . must insist upon a respect for duty and a discipline without counterpart in civilian life." Id. at 757; see *Chappell* v. *Wallace,* 462 U.S. 296, 300, 76 L. Ed. 2d 586, 103 S. Ct. 2362 (1982); *Parker* v. *Levy,* 417 U.S. 733, 743, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1953).

The creation of a military tribunal does not divest the Article III civil courts of any portion of their statutory jurisdiction. *Schlesinger* v. *Councilman,* 420 U.S. at 745. Although valid, final decisions of a military court are not subject to direct review in an Article III court, id. at 746, such decisions may be collaterally attacked by means of a petition for a writ of habeas corpus, such as the one filed here. The fact that the Court may have habeas corpus jurisdiction, however, does not mean that the Court should prematurely address the merits of a claim and thereby end the military proceedings. The Court must consider whether the exercise of its remedial power is consistent with principles of equitable jurisdiction.

The Supreme Court has held that the necessity of respect for coordinate judicial systems, a principle known as comity, dictates that "when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention. . . ." *Schlesinger* v. *Councilman,* 420 U.S. at 758; see *Chappell* v. *Wallace,* 462 U.S. at 300 ("Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers."). Deference by the federal court avoids friction between the two court systems and may avert unnecessary or duplicative proceedings in the event that

the military outcome obviates the need for judicial intervention.

Specialist New concedes that a federal court generally would permit court martial proceedings to proceed unhindered, but argues that this case calls for an exception because (1) there is a substantial question concerning his status as a member of the military; (2) the relief he seeks in federal court is unavailable in the military tribunals; and (3) there is no special expertise in the military to resolve the issues raised in this case. n2

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n2 At oral argument, petitioner seemed to recede from this third point, noting, through counsel, that he was not questioning the legal or personal competence of the military judges.

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Specialist New tries to escape military prosecution principally by claiming that his status has been involuntarily transformed from military to civilian as a result of the Army's unlawful orders to wear U.N. insignia and other accouterments and to deploy his unit to Macedonia under U.N. Command without congressional approval. He acknowledges that his claim is novel. He nevertheless contends that the substantiality of the military's breach of his enlistment contract justifies this Court's intervention despite the principles of comity just discussed.

There certainly are cases in which the civil courts

have considered whether individuals fell within the jurisdiction of the military justice system even though addressing the issue appeared to preempt the military's jurisdiction. In *Reid* v. *Covert,* 354 U.S. 1, 1 L. Ed. 2d 1148, 77 S. Ct. 1222 (1957), the Supreme Court addressed whether the spouse of a soldier may be court martialed. In *McElroy* v. *Guagliardo,* 361 U.S. 281, 4 L. Ed. 2d 282, 80 S. Ct. 305 (1960), the question was whether a civilian employee of the military may be court martialed. These cases are inapposite. The individuals who were the targets of the courts martial in *Reid* v. *Covert* and in *McElroy* v. *Guagliardo* had never submitted themselves to the jurisdiction of the military courts because they had never become members of the military. Thus, in those cases the Constitution prohibited the exercise of military authority over the individuals. See *Reid* v. *Covert,* 354 U.S. at 21; *McElroy* v. *Guagliardo,* 361 U.S. at 284-85. Specialist New's situation is plainly different because, as even he concedes, he submitted to the jurisdiction of the military tribunals by enlisting in the Army.

In *Toth* v. *Quarles,* 350 U.S. 11, 100 L. Ed. 8, 76 S. Ct. 1 (1955), the Supreme Court considered whether a former serviceman–a man who had once submitted to the authority of the military justice system and was being prosecuted for conduct that occurred during his military service–could be court martialed. In *Toth,* the individual who was targeted by military authorities was not a member of the military at the time the military sought to prosecute him. The Supreme Court considered the history behind the establishment of military courts and concluded that prosecution of a former soldier who had completely and officially severed his links with the military did not require "a prompt, ready-at-hand means of compelling obedience and order." *Toth* v. *Quarles,* 350 U.S. at 22. Specialist

New's disobedience of orders relating to the wearing of appropriate gear and deployment, on the other hand, is directly related to the military's being ready to fight or defend and, thus, directly implicates the traditional bases for court martial jurisdiction. Accordingly, *Toth* v. *Quarles* does not provide any support for this Court's preempting military jurisdiction.

The case that is conceptually closest to that of Specialist New is *Parisi* v. *Davidson,* 405 U.S. 34, 31 L. Ed. 2d 17, 92 S. Ct. 815 (1972). In *Parisi,* upon which Specialist New places principal reliance, a soldier applied for discharge from the Army as a conscientious objector and was proceeding through an established administrative process set up for those claiming conscientious objector status. He petitioned for a writ of habeas corpus before the Army finished reviewing its initial rejection of his claim. The district court retained jurisdiction over the habeas action, but declined to consider the merits of the petition because the Army had not completed its administrative consideration of the conscientious objector claim. The soldier then received orders to be deployed to Vietnam. He applied for a stay to permit the consideration of his habeas corpus petition, but it was denied. The soldier refused to comply with the deployment order and a court martial was commenced. In the meantime, the Army finished reviewing its denial of the soldier's conscientious objector claim and again denied him conscientious objector status. Although the soldier had now exhausted his administrative remedies, the federal district court stayed consideration of the still unresolved habeas petition because of the now pending court martial proceeding. The soldier then was convicted of disobeying the order deploying him to Vietnam. The Ninth Circuit affirmed the district court's refusal to reach the merits of the habeas petition, but the Supreme Court reversed.

The Supreme Court explained that the issue was whether in light of the mere fact that a court martial proceeding was pending, a federal district court should postpone adjudication of an independent civil lawsuit based on a separate administrative determination clearly within its jurisdiction. *Parisi* v. *Davidson,* 405 U.S. at 41. The Court noted that exhaustion doctrines were not relevant because the soldier had fully complied with Army administrative procedures. Id. at 40. The only circumstance that was preventing consideration of the habeas petition was the fact that a court martial proceeding relating to Parisi's failure to follow orders had been instituted while his conscientious objector claim was pending determination. Thus, the relevant issue to consider was comity.

The Supreme Court in *Parisi* determined that deference to the military by the district court on grounds of comity was not appropriate because there was no issue relating to "a federal district court's direct intervention in a case arising in the military court system." *Parisi* v. *Davidson,* 405 U.S. at 41. The habeas corpus petition related to the final administrative determination of Parisi's conscientious objector claim, a matter "independent of the military criminal proceedings," id., and not to the pending court martial for failure to follow orders. Procedurally, Specialist New comes to this Court in the latter situation, not the former. Specialist New argues that he has done all that he could do informally, but this argument is unavailing. The fact is that there are formal procedures to determine conscientious objector status, and it has long been established that the exhaustion of those procedures entitles one to habeas corpus consideration by an Article III court. Id. at 34. In permitting a serviceman claiming conscientious objector status who has exhausted all administrative remedies to proceed by way of habeas corpus, the court in Parisi did "no

more than recognize the historic respect in this Nation for valid conscientious objection to military service." Id. at 45.

Unlike the situation presented to the Court in *Parisi,* there are no such formal procedures available for claims like those of Specialist New, and for good reason. His claim is novel, indeed, unprecedented. Unlike in *Parisi,* the asserted status change on which Specialist New relies is a virtually unheard of claim. The consequences of holding that a serviceman on active duty can unilaterally escape military jurisdiction by raising such a novel argument concerning his status as a member of the military could be disruptive to military discipline, obedience and confidence. To accept Specialist New's claim would be to undermine the presumption of lawfulness that attaches to orders ultimately emanating from the Commander-in-Chief to put U.S. soldiers at risk on foreign soil, and to the established procedure, a court martial, to test their lawfulness in the first instance. By contrast with *Parisi,* the Army has not yet had an opportunity to consider Specialist New's contention. Nor has either the Congress or the military established separate administrative mechanisms to do so. Absent other considerations, the Supreme Court's decisions in *Parisi* and Councilman require this Court to stay its hand.

The next question is whether, as Specialist New suggests, *Parisi* recognized a general status exception beyond the specific unique status of a conscientious objector that would justify intervention by an Article III court before the court martial proceedings and appeals have run their course. Even if Specialist New is correct that new uniforms, new rules and new commanders would change his status into that of a United Nations soldier, his claim has not yet ripened. Specialist New has not worn the United Nations shoulder patch or the United Nations cap; he has not carried into the

Republic of Macedonia the United Nations identity card; he has not been subject to United Nations operational control or new codes of conduct or protections. The compelled transformation of Michael New from a United States Army Specialist into a United Nations soldier has not occurred. While petitioner's counsel have argued that his status changed on October 10, 1995 when he was supposed to fall out in a United Nations uniform, or that his status changed when the Army ordered him to do so, the fact is that, in their words, he "refused to let this happen." He did not wear the U.N. uniform or insignia to the October 10 formation. Had he done so, his change of status argument under *Parisi* might have more force. His refusal to do so maintains his status as a member of the United States Armed Forces subject to court martial proceedings in which he can test the lawfulness of the order he refused to obey.

It is an even more tenuous stretch to suggest that Specialist New's status changed from military to civilian. Even if ultimately there is merit to the argument that the orders given to Specialist New were unlawful because they changed his responsibilities and allegiances from U.S. to U.N., the Court would find it difficult to conclude that such changes transformed Specialist New's status from U.S. military to civilian. As the Supreme Court explained in *United States* v. *Grimley,* 137 U.S. 147, 34 L. Ed. 636, 11 S. Ct. 54 (1890), a United States Armed Forces enlistment contract is a special sort of contract because "it is one of those contracts which changes the status, and where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence implies." *United States* v. *Grimley,* 137 U.S. at 151; see *Bell* v. *United States,* 366 U.S. 393, 402, 6 L. Ed. 2d 365, 81 S. Ct. 1230 (1961); *United States* v. *Williams,* 302 U.S. 46, 82 L. Ed. 39, 58 S. Ct. 81 (1937). Likening enlistment to a

contract of marriage, the Court recognized that "a breach of [the obligations of mutual faithfulness] does not destroy the status or change the relation of the parties to each other." *United States* v. *Grimley,* 137 U.S. at 152. Because efficiency and confidence are crucial to the functioning of the military, public policy requires that military status should not be disturbed unless "there be in the nature of things some inherent vice in the existence of the relation, or natural wrong in the manner in which it was established. . . ." Id. at 153 (emphasis added).

Specialist New does not allege that there was any "natural wrong" in the manner in which his relationship with the military was established through the enlistment contract. Thus, this case is unlike those in which federal courts have invoked their jurisdiction to determine if Army representatives made material misrepresentations to an enlistee or because of some other defect in the formation of the contract. See, e.g., *Pence* v. *Brown,* 627 F.2d 872 (8th Cir. 1980); *Bonnet* v. *Byers,* 603 F.2d 85 (9th Cir. 1979); *Brown* v. *Dunleavy,* 722 F. Supp. 1343 (E.D. Va. 1989); *Novak* v. *Rumsfeld,* 423 F. Supp. 971 (N.D. Cal. 1976).

Nor is there "some inherent vice in the existence of the relationship" between the U.S. Army and Specialist New. He has not yet been transformed from his status as a member of the United States Armed Forces or broken any law or regulation by accepting the badges or office of a foreign nation. He currently is involved in a proceeding during which he can challenge the military's jurisdiction over him and the legality of the Army's order. If he is dissatisfied with the military tribunals' resolution of his case, then he may seek collateral review in the civil courts. While the matter is pending, Specialist New remains on active duty with the United States Armed Forces and is receiving his

standard pay, clear indicia that his status has not changed even if, as he asserts, his enlistment contract has been breached. See *Bell* v. *United States,* 366 U.S. at 401-02. So long as Specialist New is being granted the process to which he is entitled as a member of the military, there is no "inherent vice" in the continuation of his military status. Petitioner's interpretation of *Parisi* does not trump the Supreme Court's decisions in *Grimley, Bell,* and *Williams.*

Finally, Specialist New argues that *Parisi* provides support for his position because the Supreme Court in *Parisi* also observed that even if the serviceman successfully defended himself at the court martial, success in his court martial would not lead to the discharge from military service that he sought through the conscientious objector proceeding. *Parisi* v. *Davidson,* 405 U.S. at 42-43. Specialist New heralds the unavailability through the court martial of an honorable discharge from military service as the reason why he can seek redress in this Court now. But Specialist New's request for an honorable discharge as his ultimate relief comes late. He originally requested rescission of the assertedly unlawful order or transfer to another unit to avoid having to wear United Nations accouterments. Pet.'s Ex. C, Statement of Michael New. And he was "reluctantly willing to accept an honorable discharge, and to sadly and reluctantly withdraw from the U.S. Army quietly" only as a fallback from the relief he really wanted. Id. at P 3.

It was not until oral argument in this Court that Michael New abandoned his request for rescission of the orders or transfer to another unit, stating for the first time that he no longer wished to serve in the military, seeking only an honorable discharge. This was so, he said, because now he believes that if he remains in the military that these proceedings will be a badge of infamy and he will be

scorned. The infamy and scorn he fears, however, may be an inevitable consequence of being a member of the Armed Forces who has disobeyed an order or taken an unconventional or unpopular position as a matter of principle. That possibility, however, does not serve to make his claim a free-standing one, separate and independent from the matters at issue in the military prosecution. The Court therefore concludes that to consider the merits of the habeas petition at this time would be to directly intervene in the military case, a path not countenanced by the Supreme Court in *Parisi*.

In sum, this case exemplifies the type of situation that demands observance of the principle of comity. After all, comity incorporates more than the practical considerations behind an exhaustion requirement. Comity dictates that "one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Darr* v. *Burford,* 339 U.S. 200, 204, 94 L. Ed. 761, 70 S. Ct. 587 (1950). Specialist New's claim that the military tribunal lacks jurisdiction over him and that his orders are unlawful can be and has been made to the military tribunal, see *Apple* v. *Greer,* 554 F.2d 105, 109 (3d Cir. 1977), and military tribunals are competent to consider these sorts of constitutional and statutory questions. *Schlesinger* v. *Councilman,* 420 U.S. at 758; Levy v. Corcoran, 128 U.S. App. D.C. 388, 389 F.2d 929, 930-31 (D.C. Cir. 1967) (Leventhal, J. concurring). "Congress having provided the extensive and elaborate system designed to achieve justice within the military, no warrant appears for judicial end-running of that system." *Williams* v. *Secretary of the Navy,* 787 F.2d 552, 559-61 (Fed. Cir. 1986). The issues raised in this case are within the province of the military

tribunals, and there is no need for this Court to "blaze a trail on unfamiliar ground" when the military court stands ready to consider Specialist New's claims. *Noyd* v. *Bond,* 395 U.S. 683, 696, 23 L. Ed. 2d 631, 89 S. Ct. 1876 (1969); see *Gusik* v. *Schilder,* 340 U.S. 128, 131-32, 95 L. Ed. 146, 71 S. Ct. 149 (1950).

III. CONCLUSION

As the Court noted at the time of its decision denying Specialist New's request to stay the court martial proceedings, the issues he raises under the United Nations Participation Act are important issues, implicating the balance of power between the President as Commander-in-Chief and the Congress and the relationship between the United States and the United Nations. This Court has taken them seriously. The Court rejects the notion that the quality of justice in the military tribunals is inferior to that which is provided by Article III courts and is confident that the military tribunals and the Court of Appeals for the Armed Forces will do so as well. For the reasons stated, comity requires this Court to stay its hand until the court martial proceedings and all appeals have run their course. Accordingly, it is hereby

ORDERED that Michael G. New's petition for a writ of habeas corpus is DENIED. Once the military proceedings are completed, Specialist New may either move to reopen this proceeding or file a new petition for a writ of habeas corpus.

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLE I § 8., Cl. 14. .

To make Rules for the Government and Regulation of the land and naval Forces.

ARTICLE I § Sec. 9, Cl. 8.

No Title of Nobility shall be granted by the United States: and no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, emolument, Office, or Title of any kind whatever from any King, Prince, or foreign State.

ARTICLE II Sec. 2, Cl. 1.

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual
Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

ARTICLE § 2, Sec. 2, Cl 2.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint

Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

ARTICLE III § 1.

The judicial power of the United States shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

STATUTES

5 USCS § 7342 (1997)

§ 7342. Receipt and disposition of foreign gifts and decorations

(a) For the purpose of this section--

(1) "employee" means--

(A) an employee as defined by section 2105 of this title and an officer or employee of the United States Postal Service or of the Postal Rate Commission;

(B) an expert or consultant who is under contract under section 3109 of this title with the United States or any agency, department, or establishment thereof, including, in the case of an organization performing services under such section, any individual involved in the performance of such services;

(C) an individual employed by, or occupying an office or position in, the
government of a territory or possession of the United States or the government
of the District of Columbia;

(D) a member of a uniformed service;

(E) the President and the Vice President;

(F) a Member of Congress as defined by section 2106 of this title (except the Vice President) and any Delegate to the Congress; and

(G) the spouse of an individual described in subparagraphs (A) through (F) (unless such individual and his or her spouse are separated) or a dependent (within the meaning of section 152 of the Internal Revenue Code of 1954) of such an individual, other than a spouse or dependent who is an employee under subparagraphs (A) through (F);

(2) "foreign government" means--

(A) any unit of foreign governmental authority, including any foreign national, State, local, and municipal government;

(B) any international or multinational organization whose membership is composed of any unit of foreign government described in subparagraph (A); and

(C) any agent or representative of any such unit or such organization, while acting as such;

(3) "gift" means a tangible or intangible present (other than a decoration) tendered by, or received from, a foreign

government;

(4) "decoration" means an order, device, medal, badge, insignia, emblem, or award tendered by, or received from, a foreign government;

(5) "minimal value" means a retail value in the United States at the time of acceptance of $ 100 or less, except that--

(A) on January 1, 1981, and at 3 year intervals thereafter, "minimal value" shall be redefined in regulations prescribed by the Administrator of General Services, in consultation with the Secretary of State, to reflect changes in the consumer price index for the immediately preceding 3-year period; and

(B) regulations of an employing agency may define "minimal value" for its employees to be less than the value established under this paragraph; and

(6) "employing agency" means--

(A) the Committee on Standards of Official Conduct of the House of Representatives, for Members and employees of the House of Representatives, except that those responsibilities specified in subsections (c)(2)(A), (e)(1), and (g)(2)(B) shall be carried out by the Clerk of the House;

(B) the Select Committee on Ethics of the Senate, for Senators and employees of the Senate, except that those responsibilities (other than responsibilities involving approval of the employing agency) specified in subsections (c)(2), (d), and (g)(2)(B) shall be carried out by the Secretary of the Senate;

(C) the Administrative Office of the United States Courts, for judges and judicial branch employees; and

(D) the department, agency, office, or other entity in which an employee is employed, for other legislative branch employees and for all executive branch employees.

(b) An employee may not--

(1) request or otherwise encourage the tender of a gift or decoration; or

(2) accept a gift or decoration, other than in accordance with the provisions of subsections (c) and (d).

(c)(1) The Congress consents to--

(A) the accepting and retaining by an employee of a gift of minimal value tendered and received as a souvenir or mark of courtesy; and

(B) the accepting by an employee of a gift of more than minimal value when such gift is in the nature of an educational scholarship or medical treatment or when it appears that to refuse the gift would likely cause offense or embarrassment or otherwise adversely affect the foreign relations of the United States, except that--

(i) a tangible gift of more than minimal value is deemed to have been accepted on behalf of the United States and, upon acceptance, shall become the property of the United States; and

(ii) an employee may accept gifts of travel or expenses for travel taking place entirely outside the United States (such as transportation, food, and lodging) of more than minimal

value if such acceptance is appropriate, consistent with the interests of the United States, and permitted by the employing agency and any regulations which may be prescribed by the employing agency.

(2) Within 60 days after accepting a tangible gift of more than minimal value (other than a gift described in paragraph (1)(B)(ii)), an employee shall--

(A) deposit the gift for disposal with his or her employing agency; or

(B) subject to the approval of the employing agency, deposit the gift with that agency for official use.

Within 30 days after terminating the official use of a gift under subparagraph (B), the employing agency shall forward the gift to the Administrator of General Services in accordance with subsection (e)(1) or provide for its disposal in accordance with subsection (e)(2).

(3) When an employee deposits a gift of more than minimal value for disposal or for official use pursuant to paragraph (2), or within 30 days after accepting travel or travel expenses as provided in paragraph (1)(B)(ii) unless such travel or travel expenses are accepted in accordance with specific instructions of his or her employing agency, the employee shall file a statement with his or her employing agency or its delegate containing the information prescribed in subsection (f) for that gift.

(d) The Congress consents to the accepting, retaining, and wearing by an employee of a decoration tendered in recognition of active field service in time of combat operations or awarded for other outstanding or unusually

meritorious performance, subject to the approval of the employing agency of such employee. Without this approval, the decoration is deemed to have been accepted on behalf of the United States, shall become the property of the United States, and shall be deposited by the employee, within sixty days of acceptance, with the employing agency for official use or forwarding to the Administrator of General Services for disposal in accordance with subsection (e)(1), or for disposal in accordance with subsection (e)(2).

(e)(1) Except as provided in paragraph (2), gifts and decorations that have been deposited with an employing agency for disposal shall be (A) returned to the donor, or (B) forwarded to the Administrator of General Services for transfer, donation, or other disposal in accordance with the provisions of the Federal Property and Administrative Services Act of 1949 [40 USCS § 471 note]. However, no gift or decoration that has been deposited for disposal may be sold without the approval of the Secretary of State, upon a determination that the sale will not adversely affect the foreign relations of the United States. Gifts and decorations may be sold by negotiated sale.

(2) Gifts and decorations received by a Senator or an employee of the Senate that are deposited with the Secretary of the Senate for disposal, or are deposited for an offical use which has terminated, shall be disposed of by the Commission on Arts and Antiquities of the United States Senate. Any such gift or decoration may be returned by the Commission to the donor or may be transferred or donated by the Commission, subject to such terms and conditions as it may prescribe, (A) to an agency or instrumentality of (i) the United States, (ii) a State, territory, or possession of the United States, or a political subdivision of the foregoing, or (iii) the District of Columbia, or (B) to an organization

described in section 501(c)(3) of the Internal Revenue Code of 1954 [26 USCS § 501(c)(3)] which is exempt from taxation under section 501(a) of such Code [26 USCS § 501(a)]. Any such gift or decoration not disposed of as provided in the preceding sentence shall be forwarded to the Administrator of General Services for disposal in accordance with paragraph (1). If the Administrator does not dispose of such gift or decoration within one year, he shall, at the request of the Commission, return it to the Commission and the Commission may dispose of such gift or decoration in such manner as it considers proper, except that such gift or decoration may be sold only with the approval of the Secretary of State upon a determination that the sale will not adversely affect the foreign relations of the United States.

(f)(1) Not later than January 31 of each year, each employing agency or its delegate shall compile a listing of all statements filed during the preceding year by the employees of that agency pursuant to subsection (c)(3) and shall transmit such listing to the Secretary of State who shall publish a comprehensive listing of all such statements in the Federal Register.

(2) Such listings shall include for each tangible gift reported--

(A) the name and position of the employee;

(B) a brief description of the gift and the circumstances justifying acceptance;

(C) the identity, if known, of the foreign government and the name and position of the individual who presented the gift;

(D) the date of acceptance of the gift;

(E) the estimated value in the United States of the gift at the time of acceptance; and

(F) disposition or current location of the gift.

(3) Such listings shall include for each gift of travel or travel expenses--

(A) the name and position of the employee;

(B) a brief description of the gift and the circumstances justifying acceptance; and

(C) the identity, if known, of the foreign government and the name and position of the individual who presented the gift.

(4) In transmitting such listings for the Central Intelligence Agency, the Director of Central Intelligence may delete the information described in subparagraphs (A) and (C) of paragraphs (2) and (3) if the Director certifies in writing to the Secretary of State that the publication of such information could adversely affect United States intelligence sources.

(g)(1) Each employing agency shall prescribe such regulations as may be necessary to carry out the purpose of this section. For all employing agencies in the executive branch, such regulations shall be prescribed pursuant to guidance provided by the Secretary of State. These regulations shall be implemented by each employing agency for its employees.

(2) Each employing agency shall--

(A) report to the Attorney General cases in which there is reason to believe that an employee has violated this section;

(B) establish a procedure for obtaining an appraisal, when necessary, of the value of gifts; and

(C) take any other actions necessary to carry out the purpose of this section.

(h) The Attorney General may bring a civil action in any district court of the United States against any employee who knowingly solicits or accepts a gift from a foreign government not consented to by this section or who fails to deposit or report such gift as required by this section. The court in which such action is brought may assess a penalty against such employee in any amount not to exceed the retail value of the gift improperly solicited or received plus $5,000.

(i) The President shall direct all Chiefs of a United States Diplomatic Mission to inform their host governments that it is a general policy of the United States Government to prohibit United States Government employees from receiving gifts or decorations of more than minimal value.

(j) Nothing in this section shall be construed to derogate any regulation prescribed by any employing agency which provides for more stringent limitations on the receipt of gifts and decorations by its employees.

(k) The provisions of this section do not apply to grants and other forms of assistance to which section 108A of the Mutual Educational and Cultural Exchange Act of 1961 [22

USCS § 2458a] applied.

22 USCS § 287d

Use of armed forces; limitations

The President is authorized to negotiate a special agreement or agreements with the Security Council which shall be subject to the approval of the Congress by appropriate Act or joint resolution, providing for the numbers and types of armed forces, their degree of readiness and general location, and the nature of facilities and assistance, including rights of passage, to be made available to the Security Council on its call for the purpose of maintaining international peace and security in accordance with article 43 of said Charter. The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under article 42 of said Charter and pursuant to such special agreement or agreements the armed forces, facilities, or assistance provided for therein: Provided, That, except as authorized in section 7 of this Act [22 USCS § 287d-1], nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements.

22 USCS § 287d-1

Noncombatant assistance to United Nations

(a) Armed forces details; supplies and equipment; obligation of funds; procurement and replacement of requested items. Notwithstanding the provisions of any other law, the President, upon the request by the United Nations for cooperative action, and to the extent that he finds that it is consistent with the national interest to comply with such requests, may authorize, in support of such activities of the United Nations as are specifically directed to the peaceful settlement of disputes and not involving the employment of armed forces contemplated by chapter VII of the United Nations Charter--

(1) the detail to the United Nations, under such terms and conditions as the President shall determine, of personnel of the armed forces of the United States to serve as observers, guards, or in any noncombatant capacity, but in no event shall more than a total of one thousand of such personnel be so detailed at any one time: Provided, That while so detailed, such personnel shall be considered for all purposes as acting in the line of duty, including the receipt of pay and allowances as personnel of the armed forces of the United States, credit for longevity and retirement, and all other perquisites appertaining to such duty: Provided further, That upon authorization or approval by the President, such

personnel may accept directly from the United Nations (a) any or all of the allowances or perquisites to which they are entitled under the first proviso hereof, and (b) extraordinary expenses and perquisites incident to such detail;

(2) the furnishing of facilities, services, or other assistance and the loan of the agreed fair share of the United States of any supplies and equipment to the United Nations by the National Military Establishment [Department of Defense], under such terms and conditions as the President shall determine;

(3) the obligation, insofar as necessary to carry out the purposes of clauses (1) and (2) of this subsection, of any funds appropriated to the National Military Establishment [Department of Defense] or any department therein, the procurement of such personnel, supplies, equipment, facilities, services, or other assistance as may be made available in accordance with the request of the United Nations, and the replacement of such items, when necessary, where they are furnished from stocks.

(b) Reimbursement from United Nations; waiver of reimbursement. Whenever personnel or assistance is made available pursuant to the authority contained in subsection (a)(1) and (2) of this section, the President shall require reimbursement from the United Nations for the expense thereby incurred by the United States: Provided, That in exceptional circumstances, or when the President finds it to be in the national interest, he may waive, in whole or in part, the requirement of such reimbursement: Provided further, That when any such reimbursement is made, it shall be credited, at the option of the appropriate department of the National Military Establishment [Department of Defense], either to the appropriation, fund, or account

utilized in incurring the obligation, or to an appropriate appropriation, fund, or account currently available for the purposes for which expenditures were made.

(c) Additional appropriation authorizations. In addition to the authorization of appropriations to the Department of State contained in section 8 of this Act [22 USCS § 287e], there is hereby authorized to be appropriated to the National Military Establishment [Department of Defense], or any department therein, such sums as may be necessary to reimburse such Establishment [Department of Defense] or department in the event that reimbursement from the United Nations is waived in whole or in part pursuant to authority contained in subsection (b) of this section.

(d) Disclosure of information. Nothing in this Act [22 USCS §§ 287 et seq.] shall authorize the disclosure of any information or knowledge in any case in which such disclosure is prohibited by any other law of the United States.

28 U.S.C. § 2241
Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of

habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the

application to the other district court for hearing and determination.

ARMY REGULATION 670-1
PART TWO - UTILITY AND SELECTED ORGANIZATION UNIFORM
CHAPTER 3 - TEMPERATE AND HOT WEATHER BATTLE DRESS UNIFORMS

3-1. Authorization for wear

The temperate and hot weather battle dress uniforms (BDU's) are authorized for are authorized for year-round wear by all personnel when prescribed by the commander.

3-3. Occasions for wear

BDU's may only be worn on duty when the prescribed by the commander. They are not for travel, nor for wearing off military installations except in transit between the individual's quarters and duty station. See paragraph 2-6c for exceptions to this policy. These uniforms are issued as utility, field, training, or combat uniforms and are not intended to be worn as all-purpose uniforms when other uniforms are more appropriate.

3-4 Insignia and accouterment

Insignia and accouterment authorized for wear with these uniforms are—

a. Badges (subdued).

(1) Combat and special skills badges (pin on or

embroidered) (para 28-17a).

(2) Special skill tabs (para 28-17c).

(3) Subded identification badges (para 28-18i through m).

b. Brassards (para 27-27).

c. Branch insignia (paras 27-10b and 27-12b).

d. Combat Leaders Identification (para 27-20).

e. Distinctive infantry insignia (para 27-28).

f. Grade insignia (paras 27-5, 27-6, and 27-7).

g. Headgear insignia (para 27-3).

h. Subdued shoulder sleeve insignia, current organization (para 27-16e(2)).

i Subdued shoulder sleeve insignia, former wartime service (para 27-17c(2)).

j. Name and U.S. Army distinguishing tapes (paras 27-22a and 27-22b).

k. Foreign badges, distinctive unit insignia, and regimental distinctive insignia will not be not be worn on these uniforms.

(2)

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No. 97-1375

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MICHAEL G. NEW,

Petitioner,

v.

WILLIAM S. COHEN,
SECRETARY OF DEFENSE, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF NATIONAL CITIZENS LEGAL NETWORK AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

Amicus Curiae National Citizens Legal Network (NCLN) is a project of Citizens United Foundation,[1] and it is the instrument through which Citizens United Foundation

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[1] This brief was not authored in whole or in part by counsel for any party. It has been funded in its entirety by the *amicus curiae*. *See* Sup. Ct. Rule No. 37.6.

The *amicus curiae* requested and received the written consents of the parties to the filing of this brief. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court. *See* Sup. Ct. Rule No. 37.3(a).

advances its views in the courts. Citizens United Foundation is a nonprofit, nonpartisan, educational organization established to conduct research and to inform and educate the public on a variety of issues of national importance, including issues related to sovereignty, separation of powers, the original intent of the Framers and the correct interpretation of the United States Constitution.

NCLN and Citizens United Foundation believe that the pending case presents the Court with important constitutional questions touching American sovereignty and separation of powers involving the original intent of the Framers and the correct interpretation of the Constitution. In particular, this brief urges the Court to grant Mr. New's petition for a writ of certiorari in order to determine whether the court of appeals has decided correctly that Mr. New has no right to have his habeas corpus petition heard until he exhausts his appeals before a military court that has no authority to rule on his constitutional claims.

STATEMENT OF FACTS

On August 21, 1995, United States Army Medical Specialist Michael J. New learned that he and the other members of his unit would soon be deployed to Macedonia to serve as "United Nations Fighting Persons." As such, Mr. New would be required to wear a United Nations uniform, carry United Nations identification, and forfeit the protections afforded United States servicemen by the Geneva Convention, in favor of the protections afforded "United Nations Fighting Persons" by the UN Charter. He would also fight under the

command of officers, each of whom swore not to seek or accept instructions with respect to the performance of any duties from any government or authority other than the United Nations (including anyone in the command structure of the U.S. Army up to and including the President of the United States).

Mr. New protested, requesting transfer to a unit not under United Nations command, or alternatively, an honorable discharge from the Army. On October 10, 1995, Mr. New was ordered to don the United Nations uniform, and he refused to do so, explaining his belief that the order was illegal and unconstitutional. He was convicted by court-martial on January 24, 1996 for failure to obey a lawful order, and sentenced to a Bad Conduct Discharge.

Mr. New petitioned for a writ of habeas corpus, contending, *inter alia*, that it was unlawful for him to wear the badges or accept the office of a foreign government, and seeking an honorable discharge. His petition was denied by the district court, *New* v. *Perry*, 919 F. Supp. 491 (D.D.C. 1996), and the district court's judgment was affirmed by the court of appeals, *New* v. *Cohen*, 129 F.3d 639 (D.C. Cir. 1997).

Mr. New's sentence was suspended pending appeal, and Mr. New is currently on involuntary leave from the Army.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari presents an important question involving the authority and obligation of Article III courts to adjudicate claims based on the Constitution. The court of appeals denied the claim for habeas corpus relief of the petitioner, Michael New, on the theory that comity requires Article III courts to await the adjudication of collateral issues by the Article I military tribunals. But the law does not require such abstention where the underlying constitutional claim properly is one for determination by the Article III court, and not an Article I tribunal, and where the petitioner's claim cannot be resolved by the Article I tribunal.

In this case, Michael New's constitutionally-based claim that he is entitled to an honorable discharge from the United States Army will not be adjudicated by the military courts' review of the bad conduct discharge thus far decided against him. Such determinations fall within the province of Article III courts. Moreover, the prior decisions of this Court indicate that habeas corpus jurisdiction for Article III adjudication of Mr. New's claim presently lies. Finally, if there is no such Article III adjudication at this time, and the court martial verdict against Mr. New is sustained by the military tribunals, the court of appeals offers no assurance that habeas or other relief in an Article III court would be available.

By refusing to provide Article III review of the merits of Mr. New's claim at this time, while requiring Mr. New to await final disposition of the collateral charges against him in

the military courts, the court of appeals' decision doubly prejudices Mr. New's constitutional rights. Applying the principle of comity so as to preclude adjudication of Mr. New's constitutional claim by an Article III court neither accords with the Constitution nor follows the prior decisions of this Court. Therefore, this *amicus curiae* believes, with the petitioner, that the court of appeals' decision should be reversed. This issue is a proper one for full briefing and review by this Court. *Certiorari* should be granted.

ARGUMENT

The Petition for Certiorari being supported by this *amicus curiae* presents to the Court for determination the fundamental issue of whether the principle of comity as applied to appeals pending before military tribunals requires Article III civil courts to deny habeas corpus relief to a petitioner whose important constitutional claims could otherwise escape adjudication by an Article III court.

The decision of the lower courts would require the petitioner, Michael New, to exhaust military appeals of his court martial conviction, in a case where that conviction was based exclusively on Mr. New's principled refusal to violate his oath as a member of the Armed Forces by refusing to obey an illegal and unconstitutional order to transfer his allegiance to a foreign sovereign by becoming a soldier of the United Nations. The lower courts refused to entertain habeas relief, while military appeals are pending, which may be Mr. New's only opportunity for review by an Article III court.

The Court must determine whether military tribunals are the appropriate forum to rule on the validity of the order given to Mr. New, determining the merits of Mr. New's constitutional and other claims[2] which the district court found had raised "**important** issues, implicating the **balance of power** between the President as Commander-in-Chief and the Congress and the relationship between the United States and the United Nations" and which the district court "has taken...**seriously**." *New* v. *Perry*, 919 F. Supp. 491, 497-500 (D.D.C. 1996) (emphasis added).

The Supreme Court has determined that the principle of "comity" dictates that "when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention...." *Schlesinger* v. *Councilman*, 420 U.S. 738, 758 (1974). As explained by the district court, "[d]eference by the federal court avoids friction between the two court systems and may avert unnecessary or duplicative proceedings in the event that the military outcome obviates the need for judicial intervention." *New* v. *Perry*, 919 F. Supp. 491, 496.

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[2] Mr. New has challenged the President's legal authority, as Commander-in-Chief of the Armed Forces of the United States, to order Mr. New to become a soldier in the armed forces of the United Nations in violation of his oath of enlistment in the U.S. Army to support and defend the Constitution of the United States of America, as well as the terms of that enlistment.

In the instant case, however, requiring Mr. New to continue adjudicating his case before military tribunals is, at best, an exercise in futility. Rather than avoiding duplicative proceedings, deference to the military tribunals virtually guarantees duplicative proceedings, assuming that Mr. New's claim eventually would be entertained by an Article III court, a matter that is far from certain, as discussed *infra*.

The court of appeals stated that Mr. New's conviction was reviewable by the Army Court of Criminal Appeals, with the possibility of a discretionary appeal to the Court of Appeals for the Armed Forces which is composed of civilian judges, and is a legislative Article I court. *New v. Cohen*, 129 F.3d 639, 642 (D.C. Cir. 1997).

A military tribunal comprised of military personnel subordinate to the President of the United States is clearly not the proper forum to consider "unprecedented" and "important issues, implicating the balance of power between the President as Commander-in-Chief and the Congress and the relationship between the United States and the United Nations" as stated by the district court. The Court of Appeals for the Armed Forces, likewise, as a legislative, Article I Court, has no meaningful role in determining the proper constitutional relationship between the Congress and the President. In neither case is there a need to tap the special expertise of the military courts, as the constitutional issue raised is clearly beyond both their expertise and competence.

Since the very early days of the Republic, it has been firmly established that Article III courts are vested with the

power and obligation to interpret the Constitution and laws of the United States arising thereunder. "The constitution vests the whole judicial power of the United states in one Supreme Court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 173-74 (1803). "It is **emphatically** the **province** and **duty** of the judicial department to say what the law is." *Id.* at 177 (emphasis added).

When presented with an actual case or controversy, the judicial branch has the obligation to define limits of the powers of the various branches of the federal government, the essence of Mr. New's constitutional claims. In *Marbury* v. *Madison*, for example, the Court concluded that it did not have the power to issue a writ of mandamus to the Secretary of State, because the issuance of such a writ required the exercise of original jurisdiction and the Constitution limited the Court's original jurisdiction to all "cases involving ambassadors, other public ministers and consuls, and those in which a state shall be a party." *Id.* at 174.

In *Powell* v. *McCormack*, 395 U.S. 486 (1969), the Court construed Congress's powers. It held that the House of Representatives was limited to applying only the standing qualifications expressly prescribed by Article I, Section 5 of the Constitution in judging the qualifications of its members

The Court has also had occasion to define the contours of Presidential powers and privilege. For example, in

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952), the Court held that the President, absent statutory authorization, did not have the power to order the seizure and operation of the nation's steel mills by the government. More recently, in *Clinton* v. *Jones*, 520 U.S. ___, 117 S.Ct. 1636 (1997), the Court held that the Constitution does not accord the President temporary immunity from civil litigation arising out of events occurring before he took office.

Unquestionably, the judicial branch has been viewed by this Court as being vested by the Constitution with the power and obligation to define the powers and privileges of a particular branch of government. As the Court explained in *Baker* v. *Carr*, 369 U.S. 186 (1962):

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. [*Id.*, at 211.]

Such power should not be delegated to, shared with, or exercised by military tribunals or Article I courts. In *Northern Pipeline Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Court held that 28 U.S.C. § 1471, by which Congress made a broad grant of jurisdiction to Article I bankruptcy courts, is unconstitutional. As the plurality opinion states: "The judicial power of the United States must be exercised by courts having the attributes prescribed in Art.

III." *Id.*, p. 59. The Court, in *Commodity Futures Trading Commission* v. *Shor*, explained the fundamental rationale underlying this rule, stating that Article III, section 1 serves "to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government.'" 478 U.S. 833, 848 (1986) (*quoting U.S.* v. *Will*, 449 U.S. 200, 218 (1980)).

The right of litigants discussed in *Shor* has been protected by this Court despite government appeals for deference to the military courts. Thus, where an Article I military tribunal has assumed jurisdiction over an individual, the Court has recognized that he or she may petition an Article III court for habeas corpus relief when the petition raises a substantial and unresolved constitutional claim. In *Reid* v. *Covert*, 354 U.S. 1 (1957), the Court affirmed the power to the district courts to grant relief to the spouses of military personnel who were unconstitutionally subjected to prosecution under the Uniform Code of Military Justice. Similarly, in *McElroy* v. *Guarliardo*, 361 U.S. 281 (1960), the Court held that a civilian employee of the armed forces serving with the armed forces in a foreign country cannot constitutionally be subjected to a court-martial in time of peace. And in *Toth* v. *Quarles*, 350 U.S. 11 (1955), the Court held that a former Air Force serviceman could not constitutionally be subjected to trial by court-martial for crimes alleged to have been committed while he was in the military. In each of these cases, the Court determined that adjudication of the petitioner's claim should proceed immediately in the Article III court, and should not await further proceedings by the Article I tribunal.

Although not explicitly stated within these opinions, in each case the implicit justification for deciding the merits of the petitioners' claims was that Article III courts were the appropriate forum for adjudicating what were found to be substantial constitutional claims. Indeed, the Court took note of this very point in *Noyd* v. *Bond*, 395 U.S. 683 (1969), commenting that in *Reid*, *McElroy* and *Toth*, *supra*, it "vindicated complainants' claims without requiring exhaustion of military remedies," because "we did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented." *Id.* at 696, n.8.

With respect to the issue of expertise, the court of appeals found that the case of *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), was controlling, and under that case that "military courts are capable of, and indeed may have superior expertise in, considering challenges to their jurisdiction over disciplinary proceedings." *New* v. *Cohen*, 123 F.3d 639, 645. But in *Councilman* the issue presented was whether a service member's alleged offense is "service related." That authority is inapposite here, where important constitutional issues have been raised, as discussed, *supra*.

The decision of the court of appeals violates Mr. New's right to have his constitutional claims heard before an Article III court as the proper forum for adjudicating substantial constitutional claims. Instead, the court of appeals held that Mr. New present those claims "to the military authorities reviewing his case." *New* v. *Cohen*, 129 F.3d 639, 646.

The Article III Courts' refusal to accept jurisdiction of this substantial constitutional claim should not stand, even if Mr. New would ultimately be able to pursue his claims in an Article III Court. There is no reason to require Mr. New to suffer needless delay, force him and his attorneys to waste precious resources, and put his life on hold for an even longer period, while the military courts conduct a judicial exercise for which they were never designed. The factual record in this case is fully developed, and an Article I court is not competent to rule on Mr. New's constitutional claims in any event. As a consequence, requiring Mr. New to exhaust his military appeals prior to seeking habeas relief would be pointless and wasteful. As the Court explained in *Fay* v. *Noia*, 372 U.S. 391, 437 (1963), "comity does not demand that such a price in squandered judicial resources be paid; the needs of comity are adequately served in other ways."

But there is an even greater risk. Unless the district court is directed to proceed with the habeas corpus petition, there is no guarantee that Mr. New would eventually be able to have his claims aired in an Article III court. Both the district court and the court of appeals appeared to indicate that Mr. New might, but not necessarily would, have his claims heard on the merits in an Article III court.

The district court stated: "[o]nce the military proceedings are completed, Specialist New may either move to reopen this proceeding or file a new petition for a writ of habeas corpus." The district court did not, and perhaps could not, say whether the district court would consider the petition on its merits.

The court of appeals was much more guarded in its assessment of the likelihood of Mr. New obtaining review in an Article III court, and implicitly questioned whether the district court was correct in stating that habeas corpus would be an available remedy. The court of appeals seemed to assert that only if the court-martial jury had ordered his incarceration in a military prison, a scenario which the Court said is "now foreclosed," could he have filed a habeas petition in federal district court. *New v. Cohen*, 129 F.3d at 647.[3]

That option having been foreclosed, a conviction with an other than honorable discharge would leave him only two possible options, according to the court of appeals. First, "[i]f

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[3] The court of appeals' view of the unavailability of post-discharge habeas relief could be accurate. Federal habeas corpus relief is available to persons held "in custody" in violation of the Constitution of the United States or the laws enacted thereunder, 28 U.S.C. § 2241. Mr. New's sentence does not include incarceration; he was sentenced to a bad conduct discharge only. Once Mr. New's last military appeal is concluded, arguably, he could be considered to no longer be in the custody of the military if his sentence is affirmed by military authorities; yet he would continue to suffer the stigma of a bad conduct discharge without the certainty of having his constitutional claims ruled on by an Article III court via a habeas petition. Under the Army's theory of the case, by not having incarcerated Mr. New, and then arguing comity to avoid habeas review at this time, the Army could be attempting to manipulate circumstances so as to avoid an Article III court's review of Mr. New's bad conduct discharge and the important constitutional issues he raises about the authority of the Army to issue the very orders Mr. New is challenging.

he suffers monetary losses as a result of his discharge, he **may** be able to collaterally attack the underlying conviction in the United States Court of Federal Claims, an Article I court under 28 U.S.C. §§ 171(a). Second, "New also **might** be able to bring an action in district court seeking nullification of the conviction underlying his bad conduct discharge. And by way of further caveat, the court of appeals stated that "[i]n delineating these scenarios, however, we **do not mean to suggest** that New's claims have merit or that **a federal court would even reach the merits** of his arguments." *New v. Cohen*, 129 F.3d at 648 (emphasis added).

In truth, by requiring Mr. New to exhaust his military remedies before an Article III court will entertain a habeas corpus petition, the court of appeals may have effectively denied Mr. New the right to have his important constitutional claims ruled on by an Article III court within the judicial branch of the federal government. Surely, the principle of comity, however important, cannot be allowed to result in the complete abrogation of Mr. New's right to a hearing on the merits of his constitutional claims before an Article III court. To provide Mr. New his proper day in court, the district court should be directed by the court of appeals to entertain Mr. New's habeas petition without further delay.

CONCLUSION

For the reasons stated above, the National Citizens Legal Network urges the Court to grant the Petition for Writ of Certiorari of Michael New.

Respectfully Submitted,

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